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tatus: GRANTED

Title: United States Department of Transportation, et al., Petitioners
v.
Paralyzed Veterans of America, et al.

ocketed:
ugust 20, 1985

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Parker, Douglas L., Davison, Calvin

ntry	Date	Note	Proceedings and Orders
1	Jul 11 1985		Application for extension of time to file petition and order granting same until August 26, 1985 (White, July 13, 1985).
2	Aug 20 1985	G	Petition for writ of certiorari filed.
4	Sep 11 1985		Order extending time to file response to petition until September 26, 1985.
5	Sep 26 1985		Brief of respondents Paralyzed Veterans of America, et al. in opposition filed.
6	Sep 26 1985		Lodging received.
7	Oct 2 1985		DISTRIBUTED. October 18, 1985
8	Oct 3 1985	X	Reply brief of petitioners U.S. DOT, et al. filed.
9	Oct 21 1985		Petition GRANTED. **
10	Nov 1 1985	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	Nov 18 1985		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
13	Nov 25 1985		Order extending time to file brief of petitioner on the merits until December 19, 1985.
14	Dec 19 1985		Brief amicus curiae of Equal Employment Advisory Counsel filed.
15	Dec 19 1985		Brief amicus curiae of International Air Transport Assn. filed.
16	Dec 19 1985		Brief of petitioners U.S. DOT, et al. filed.
17	Dec 19 1985		Brief amicus curiae of Air Transport Assn. of America filed.
18	Jan 13 1986		Record filed.
19	Jan 18 1986		Brief of respondent Paralyzed Veterans of America, et al. filed.
20	Jan 18 1986		Brief amicus curiae of National Federation of the Blind filed.
21	Feb 4 1986		SET FOR ARGUMENT, Wednesday, March 26, 1986. (2nd case)
22	Feb 4 1986		CIRCULATED.
23	Mar 19 1986	X	Reply brief of petitioners U.S. DOT, et al. filed.
24	Mar 26 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-289 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PARALYZED VETERANS OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether federal financial assistance to airport operators renders Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, applicable to the on-board activities of airlines using federally-assisted airports.

2. Whether the federally-operated air traffic control system constitutes a form of federal financial assistance to airlines.

PARTIES TO THE PROCEEDING

In addition to the United States Department of Transportation, the respondents in the court of appeals included the Civil Aeronautics Board and the Federal Aviation Administration. The CAB ceased operations on December 31, 1984, pursuant to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, and the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* See note 1, *infra*. The Department of Transportation assumed the CAB's functions under the Rehabilitation Act of 1973, and it is the petitioner in this Court, along with its constituent agency, the Federal Aviation Administration.

In addition to Paralyzed Veterans of America, the petitioners in the court of appeals included the American Coalition of Citizens with Disabilities, Inc. and the American Council of the Blind. All three organizations are respondents in this Court.

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UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PARALYZED VETERANS OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the United States Department of Transportation and the Federal Aviation Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-76a) is reported at 752 F.2d 694. The opinion dissenting from the denial of rehearing en banc (App., *infra*, 80a-83a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1985. A petition for rehearing was denied on April 26, 1985 (App., *infra*, 77a). On

July 13, 1985, Justice White extended the time for filing a petition for a writ of certiorari to and including August 26, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, provides in pertinent part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706 (7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

2. Regulations promulgated by the Civil Aeronautics Board to implement Section 504 of the Rehabilitation Act of 1973 were published at 47 Fed. Reg. 25936 *et seq.* (1982), as amended by 47 Fed. Reg. 51857 *et seq.* (1982), and codified at 14 C.F.R. Pt. 382. Because the issues in this case are limited to the question of the proper jurisdictional reach of the regulations and do not involve the details of the regulations themselves, only the preamble to the regulations (47 Fed. Reg. 25936-25939 (1982)), setting forth the Board's legal rationale for the scope of the regulations, is reproduced in the appendix to this petition (App., *infra*, 84a-95a).

STATEMENT

Respondents, the Paralyzed Veterans of America and two other organizations representing handicapped individuals brought this action under Section 1006 of

the Federal Aviation Act, 49 U.S.C. (1976 ed.) 1486, seeking review of regulations issued by the Civil Aeronautics Board to implement Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Section 504 prohibits discrimination on the basis of handicap in "any program or activity receiving Federal financial assistance." In its final rulemaking, the Board determined, with the approval of the Department of Justice, that only those airlines receiving a subsidy from the Board under Section 406(b) or Section 419(a)(4) and (b)(5) of the Federal Aviation Act, 49 U.S.C. (1976 ed. Supp. V) 1376(b) and 1389(a)(4) and (b)(5), were federally assisted within the meaning of Section 504.

The court of appeals disagreed, holding that the commercial aviation activities of all certificated airlines constitute federally assisted programs or activities because the airlines have the use of federally assisted airports. In addition, the court of appeals was of the view that the federally-operated air traffic control system constitutes federal financial assistance to the commercial aviation activities of all airlines. Accordingly, the court vacated the Board's regulations insofar as they were limited in their application to carriers receiving subsidies under Section 406 or 419 of the Federal Aviation Act and instructed the CAB's successor agency, the Department of Transportation, to promulgate new regulations applicable to all commercial airlines.[1]

---

[1] The CAB ceased operations on December 31, 1984. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*; Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* Section 3(e) of the Sunset Act (98 Stat. 1704) devolved all remaining authority of the CAB on the Department of Transportation, unless other-

A. The History Of The CAB's Regulations

1. Prior to the "sunset" of the CAB, federal regulation of aviation was divided between the CAB and the Federal Aviation Administration.[2] The FAA was and is responsible for operating the air traffic control system and ensuring the safety of airline operations. See *Air Line Pilots Ass'n* v. *CAB*, 667 F.2d 181 (D.C. Cir. 1981). In addition, the FAA has, since 1946, granted federal financial assistance to airport operators (typically, municipalities or other units of local government) for the construction and improvement of terminals, runways, and airport safety equipment.[3]

The CAB, on the other hand, was responsible for the economic regulation of the airline industry. In that capacity, the Board regulated airline routes, fares, and service under the authority of the Federal Aviation Act, 49 U.S.C. (1976 ed. & Supp. V) 1301 *et seq.* Of particular relevance to this case was the Board's administration of subsidies to a few airlines pursuant to Sections 406(b) and 419(a)(4) and (b)(5) of the Federal Aviation Act, 49 U.S.C. (1976 ed. Supp. V) 1376(b) and 1389(a)(4) and (b)(5).

wise provided. Section 12(a) of the Sunset Act (98 Stat. 1710) preserved all CAB rules and regulations in effect at the time of transfer.

[2] The FAA became a component of the Department of Transportation by virtue of Section 3(e)(1) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 932, recodified at 49 U.S.C. 106.

[3] See the Federal Airport Act, ch. 251, 60 Stat. 170 *et seq.*; the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 *et seq.*; and the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Tit. V, 96 Stat. 671 *et seq.* (to be codified at 49 U.S.C. 2201 *et seq.*).

Until 1978, Section 406 was the Board's only subsidy program. Designed to guarantee air service necessary to transport the mail to small communities, the original statutory scheme provided that the Postmaster General was to pay the airlines for the basic cost of transporting mail, while the Board was to pay the airlines additional amounts as subsidies if necessary to ensure the carriage of mail. See Section 406(b) and (c), 49 U.S.C. (1976 ed. Supp. V) 1376(b) and (c). The Section 406 program was sharply curtailed in 1978, and it was terminated entirely at the end of fiscal year 1982. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 24, 92 Stat. 1725; Act of Oct. 2, 1982, Pub. L. No. 97-276, § 130, 96 Stat. 1196-1197; Department of Transportation and Related Agencies Appropriations Act, 1983, Pub. L. No. 97-369, Tit. II, 96 Stat. 1778-1779.

Also in 1978, the CAB began operating the "Section 419 program," in order to subsidize "small community" and other essential air service that would not otherwise be provided. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 33, 92 Stat. 1732. This program, which is to operate through 1988, is unrelated to the provision of mail service under Section 406.

2. In 1964, Congress passed Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibiting discrimination on the basis of race, color, or national origin in federally assisted programs and activities.[4]

[4] Title VI is widely recognized as the congressional model for subsequently-enacted statutes prohibiting discrimination in federally assisted programs or activities, and case law interpreting Title VI is generally applicable to issues arising under the later-enacted statutes, including the Rehabilitation Act. See *Grove City College* v. *Bell*, No. 82-792 (Feb. 28,

Both aviation agencies, the CAB and the FAA, published regulations implementing Title VI on December 31, 1964. The only federally-assisted grant program administered by the Board at that time was the Section 406 mail subsidy program, and the Board's initial Title VI regulations, while leaving open the possibility of Title VI coverage for unspecified, future programs, expressly applied only to the activities of airlines receiving payments under the Section 406 program (14 C.F.R. 379.2 (1965), 29 Fed. Reg. 19287 (1964)):

> This part applies to any program for which Federal financial assistance is authorized under a law administered by the Board, including the payment of compensation by the Board under section 406 of the Federal Aviation Act of 1958 (49 U.S.C. 1376).[5]

After 1978, the Board modified its Title VI regulations to include its only other subsidy program, the

1984), slip op. 10; App., *infra*, 29a-30a & nn. 86-88. Accordingly, regulations issued by the FAA and the CAB to implement Title VI form the critical backdrop for consideration of the Board's Section 504 regulations at issue in this case.

[5] See also 14 C.F.R. 379.3(b) (1965), 29 Fed. Reg. 19287 (1964):

> *Specific discriminatory actions prohibited.* No air carrier shall subject any person to discrimination on the ground of race, color, or national origin in connection with any air transportation for which such carrier is receiving or has claimed compensation payable by the Board under section 406 of the Federal Aviation Act of 1958.

Similarly, the only definition the Board specified for the term "Federal financial assistance" was "grants of Federal funds under section 406 of the Federal Aviation Act of 1958." 14 C.F.R. 379.12 (1965), 29 Fed. Reg. 19289 (1964).

newly-enacted Section 419 program. 14 C.F.R. 379.2, 379.3, 379.4, and 379.12, 44 Fed. Reg. 42175-42176 (1979).

Meanwhile, the FAA, based on its administration of grants to airport operators, proscribed discriminatory treatment by airport operators and by lessees of airport operators who furnished services *at* the airport; the illustrative examples given in the FAA's Title VI regulations make it clear that its regulatory authority extended to the threshold of the planes but no farther.[6] After the FAA became a part of the Department of Transportation (see note 2, *supra*), its Title VI regulations were subsumed within DOT's own Title VI regulations (35 Fed. Reg. 10080 *et seq.* (1970)). DOT's regulations contained equivalent illustrative examples that, if anything, made it even clearer that the regulatory jurisdiction conferred by virtue of federal financial assistance to airport oper-

[6] The FAA's original Title VI regulations provided (14 C.F.R. 15.5(c) (1965), 29 Fed. Reg. 19283 (1964)):

> *Examples.* The following examples illustrate the application of the non-discrimination provisions of Title VI of the Civil Rights Act and this part:
>
> (1) The operator of an airport who is the recipient of Federal financial assistance must give assurance that an entrepreneur who rents space at the airport and there operates a restaurant will not in any manner discriminate between patrons for reasons of race, color, or national origin.
>
> (2) The operator of an airport who is the recipient of Federal financial assistance is bound by the conditions and covenants in the conveyance that prohibit, among other things, discrimination for reason of color, race, or national origin in admission of the public to waiting rooms, sightseeing areas, sanitary facilities, and any other facilities under the control of the airport operator himself.

ators extended to services provided *at* the airport, but not to the interior of aircraft.[7] Indeed, DOT's

[7] Appendix C to DOT's Title VI regulations gave the following pertinent examples of FAA programs subject to regulation (49 C.F.R. Pt. 21, App. C(a)(1) (1971), 35 Fed. Reg. 10085 (1970)):

Federal Aviation Administration. (i) The airport sponsor or any of his lessees, concessionaires, or contractors may not differentiate between members of the public because of race, color, or national origin in furnishing, or admitting to, waiting rooms, passenger holding areas, aircraft tiedown areas, restaurant facilities, restrooms, or facilities operated under the compatible land use concept.

(ii) The airport sponsor and any of his lessees, concessionaires, or contractors must offer to all members of the public the same degree and type of service without regard to race, color, or national origin. This rule applies to fixed base operators, restaurants, snack bars, gift shops, ticket counters, baggage handlers, car rental agencies, limousines, and taxis franchised by the airport sponsor, insurance underwriters, and other businesses catering to the public at the airport.

(iii) An aircraft operator may not be required to park his aircraft at a location that is less protected, or less accessible from the terminal facilities, than locations offered to others, because of his race, color, or national origin.

(iv) The pilot of an aircraft may not be required to help more extensively in fueling operations, and may not be offered less incidental service (such as windshield wiping), than other pilots, because of his race, color, or national origin.

(v) No pilot or crewmember eligible for access to a pilot's lounge or to unofficial communication facilities such as a UNICOM frequency may be restricted in that access because of his race, color, or national origin.

(vi) Access to facilities maintained at the airport by air carriers or commercial operators for holders of first-class transportation tickets or frequent users of the carrier's or operator's services may not be restricted on the basis of race, color, or national origin.

(vii) Passengers and crewmembers seeking ground transportation from the airport may not be assigned to different vehicles, or delayed or embarrassed in assignment to vehicles, by the airport sponsor or his lessees, concessionaires, or contractors, because of race, color, or national origin.

regulations prohibited airport administrators from discriminating *against* aircraft operators because of the race of the pilot (49 C.F.R. Pt. 21, App. C(a)(1)(iii) (1971), set forth at note 7, *supra*). Significantly, however, the exhaustive list of examples made no mention of passengers *in* airplanes; the only provisions for passengers related to the use of facilities *at* the airport and the use of *ground* transportation to leave the airport. 49 C.F.R. Pt. 21, App. C(a)(1)(vi) and (vii) (1971), set forth at note 7, *supra*).

In sum, the regulatory agencies recognized from the very outset that Title VI did not reach the onboard activities of commercial airlines, except for those few airlines that received subsidies from the CAB.[8]

[8] Although Title VI was never construed to reach the onboard activities of nonsubsidized air carriers, courts had early interpreted the general "antidiscrimination" clause of Section 404(b) of the Federal Aviation Act, 49 U.S.C. (1976 ed.) 1374(b), to prohibit racial discrimination by all air carriers. See *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956); *United States* v. *City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962). As described at pages 12-13, *infra*, however, Section 404(b) "lapsed" as part of the phase-out of the CAB.

3. Using their Title VI regulations as a model, DOT and the Board divided regulatory jurisdiction under Section 504 in the same fashion, with DOT taking responsibility for regulations covering activities *at* airports and the Board ultimately assuming responsibility only for the on-board activities of subsidized carriers. Initially, however, both agencies expected the CAB to be able to promulgate regulations governing the on-board activities of *all* certificated airlines, using authority derived from the Federal Aviation Act to supplement its more limited authority under Section 504. Thus, on June 6, 1979, the CAB published a Notice of Proposed Rulemaking in which it announced its intention to promulgate regulations "to prohibit unlawful discrimination against disabled travelers *and* to implement section 504 of the Rehabilitation Act of 1973." 44 Fed. Reg. 32401 (emphasis added). The Board's notice made clear its position that its jurisdiction under Section 504 was limited to those few carriers to which the Board extended federal subsidies. 44 Fed. Reg. 32402 (1979).[9]

[9] That this was the Board's view is demonstrated by its explanation for deciding not to regulate employment practices of the airlines (44 Fed. Reg. 32402 (1979) (emphasis added)):

> In accordance with the Airline Deregulation Act of 1978, the Board will be phasing out its operations over the next 6 years. * * * Under the circumstances, it would be very difficult to develop a new program in an area where we have little experience or background, and then to allocate and train staff to implement it. *This use of resources would be particularly unwise because the benefits that would flow from Board regulation of employment would be small. The Board extends direct Federal subsidies only to a small number of air carriers, so that the reach of our section 504 jurisdiction would not have a significant effect*

For that reason, the Board proposed to prohibit all carriers from discriminating against handicapped air travellers not in reliance on Section 504, but instead based on its authority under Section 404 of the Federal Aviation Act, 49 U.S.C. (1976 ed. & Supp. V) 1374. As the Board explained (44 Fed. Reg. 32401-32402 (1979) (emphasis added)):

> [The proposed rules] would implement section 504 * * *, which prohibits discrimination against the handicapped in any program or activity receiving Federal financial assistance. *In addition, the proposed rules would emphasize that the*

> *on industry employment. While we can prevent discrimination in air transportation under section 404 of the Federal Aviation Act without clear section 504 jurisdiction, the same is not true of employment. The Board would have no authority to regulate employment practices of unsubsidized carriers unless those practices somehow caused discrimination in transportation.*

Of course, the Board's statement was issued prior to this Court's decisions in *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982), and *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984). But those decisions, holding that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and Section 504 encompass employment discrimination, are not pertinent to the issue here, which is whether nonsubsidized carriers receive "Federal financial assistance" that would render their "program or activity" of transporting passengers from one place to another subject to Section 504 at all.

Contrary to the view of the court of appeals (see App., *infra*, 48a), it is also clear that DOT understood the Board's position with respect to its Section 504 jurisdiction. In the preamble to DOT's final Section 504 regulations, the Department noted that "the CAB determined that it had statutory authority to issue regulations governing air transportation of handicapped persons, both under section 504 of the Rehabilitation Act *and* under sections 404 and 411 of the Federal Aviation Act." 44 Fed. Reg. 31451 (1979) (emphasis added).

*handicapped are protected by the adequacy of service and antidiscrimination provisions of section 404 of the Federal Aviation Act * * *, which are applicable to all air carriers, whether or not receiving Federal financial assistance.*

Section 404 of the Federal Aviation Act, 49 U.S.C. (1976 ed. & Supp. V) 1374, as it existed at the time of the Board's Notice of Proposed Rulemaking, contained two provisions relevant to this case. Section 404(a)(1), 49 U.S.C. (1976 ed. Supp. V) 1374 (a)(1), contained a "safe and adequate service" requirement, obligating all air carriers to "provide safe and adequate service, equipment, and facilities in connection with [interstate and overseas air] transportation." Section 404(b), 49 U.S.C. (1976 ed.) 1374(b), contained a general "antidiscrimination" clause, prohibiting any carrier from "subject[ing] any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As set forth above, the Board was of the view that the "safe and adequate service" and "antidiscrimination" provisions of Section 404, taken together, gave the Board sufficient authority to require all carriers to comply with regulations prohibiting discrimination against handicapped air travellers, whether or not a particular carrier was receiving federal financial assistance. Pursuant to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40(a), 92 Stat. 1744 (to be codified at 49 U.S.C. 1551(a)(2)(B)), however, the "antidiscrimination" clause of Section 404(b) lapsed as of January 1, 1983; only the "safe and adequate service" requirement of Section 404(a), 49 U.S.C. (1976 ed. & Supp. V) 1374(a), remains in effect.

This contraction of the Board's statutory authority required it to reevaluate its jurisdiction to impose the proposed regulations on all carriers. After studying the numerous comments received and consulting with the Department of Justice,[10] the Board concluded that the "safe and adequate service" clause of Section 404(a) might support a general prohibition against discrimination on the basis of handicap applicable to all carriers, but that it was too slender a reed to justify the imposition of more specific regulations applicable to the on-board activities of nonsubsidized carriers. 47 Fed. Reg. 25937-25938 (1982) (App., *infra*, 85a-91a). In reaching this conclusion, the Board carefully considered, but ultimately rejected, the contention that all certificated carriers receive federal financial assistance within the meaning of Section 504 by virtue of their use of the federally-operated air traffic control system and federally-assisted airports. 47 Fed. Reg. 25937 (1982) (App., *infra*, 88a). Accordingly, the Board concluded that the on-board activities of only those airlines receiving subsidies from the Board could be regulated under Section 504. 47 Fed. Reg. 25937-25938 (1982) (App., *infra*, 85a-91a).

The final regulations promulgated by the Board (14 C.F.R. Pt. 382, 47 Fed. Reg. 25948 *et seq.*

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[10] Pursuant to Executive Order No. 12,250, 3 C.F.R. 298 (1981), the Attorney General was directed to coordinate the implementation and enforcement by Executive agencies of the nondiscrimination provisions contained in a number of civil rights statutes, including Section 504 of the Rehabilitation Act. Previously, this coordinating function had been exercised by the Secretary of Health, Education and Welfare (see Executive Order No. 11,914, 3 C.F.R. 117-118 (1977)) and, later, by the Secretary of Health and Human Services.

(1982)) contain three subparts. Subpart A is a general prohibition against discrimination in air transportation against qualified handicapped persons. Subpart B of the Board's final rules sets forth specific requirements to be followed by each regulated carrier in providing air transport service to the handicapped.[11] Subpart C establishes compliance and enforcement mechanisms. By virtue of the "safe and adequate service" provision of Section 404(a) of the Federal Aviation Act, the Subpart A prohibition applies to all certificated carriers, whether or not they receive federal financial assistance. In recognition of the limited jurisdictional reach of Section 504, however, Subparts B and C of the final regulations apply only to those carriers receiving federal subsidies under Section 406 or 419 of the Federal Aviation Act.[12] The Attorney General approved the CAB's final regulations (see note 10, *supra*).

B. The Court Of Appeals' Decision

After setting forth the history of the rulemaking, the court of appeals turned to respondents' contention that all commercial airlines are subject to Section 504. The court first rejected respondents' arguments that operating certificates and preferential tax treatment for airlines constitute "Federal financial as-

[11] Subpart B deals with such matters as the availability of information for deaf persons, guide dogs, wheelchairs, special lifts to help handicapped passengers board and deplane, and the carrying of medically-needed oxygen on board the aircraft.

[12] The Board did, however, urge nonsubsidized carriers to look to Subpart B of the Section 504 regulations for guidance in complying with the general antidiscrimination provision of Subpart A applicable by virtue of Section 404(a) alone. 47 Fed. Reg. 25938 (1982) (App., *infra*, 90a-91a).

sistance" to airlines within the meaning of Section 504.[13] The court next considered respondents' contention that the federally-operated air traffic control system constitutes federal financial assistance to airlines and concluded that it does (App., *infra*, 39a-40a, 43a (footnotes omitted)):

> It cannot be seriously disputed that the safe and efficient operation of commercial air transportation depends in great measure (if not, as [respondents] assert, "entirely") upon "the proper functioning of the national air traffic control system." * * * Moreover, this crucial assistance may reasonably be considered "financial." * * * Consequently, [respondents'] argument that the federal air traffic control system is an "arrangement" that "provides or otherwise makes available assistance in the form of . . . services of Federal personnel" leads reasonably to the conclusion that the system does indeed constitute federal financial assistance to all commercial air carriers. It follows, therefore, that any and all carriers making use of the fed-

[13] With respect to operating certificates, the court endorsed the CAB's reliance (App., *infra*, 88a) on *Gottfried* v. *FCC*, 655 F.2d 297 (D.C. Cir. 1981), in which the court had held that broadcast licenses issued by the FCC do not constitute federal financial assistance for purposes of Section 504 (App., *infra*, 34a). With respect to tax credits, the court of appeals doubted that "Congress * * * intend[ed], by granting a limited tax incentive to a particular industry or group, to thereby encompass every such individual or group, or, for that matter, individual within some ever-widening and potentially almost limitless definition of 'federal financial assistance.'" *Id.* at 37a. The court also noted the anomaly that would result from allowing the airlines themselves to determine whether they wished to comply with Section 504 simply by deciding whether or not to take advantage of tax credits (App., *infra*, 37a-38a).

> eral air traffic control system should be subject to any regulations promulgated under section 504.
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> * * * * *
>
> The fact is that the air traffic control system is *indispensable* to the *very existence* of modern commercial aviation, and that if it were not provided by the federal program now in place, it would have to be provided, and paid for, by the airlines themselves.

Despite the court's conclusion that the air traffic control system constitutes federal financial assistance to all commercial airlines, the court declined to invalidate the Board's rules on that basis, apparently because it found itself unable to define the "program or activity" that is federally assisted by the air traffic control system. Taking note of this Court's decision in *Grove City College* v. *Bell,* No. 82-792 (Feb. 28, 1984), the court observed that if the assisted "program or activity" were deemed to be the federal air traffic control system, then "only that particular system—its personnel practices and physical facilities, for example—could be regulated under section 504" (App., *infra,* 45a). On the other hand, the court reasoned that, if the assisted "program or activity" were deemed to be that of "commercial air transportation as engaged in by the air carriers," then *Grove City*'s program-specific mandate would not be violated by applying Section 504 to the on-board activities of all commercial airlines (App., *infra,* 45a).

The court then concluded that it need not resolve the "program or activity" question in the context of the air traffic control system. Instead, the court reasoned that the CAB "erred as a matter of law in failing to apply its section 504 regulations to all commercial air carriers" because of the federal government's funding of airports and airways *used* by those carriers. App., *infra,* 45a. The court stated (*id.* at 50a-51a (footnotes omitted)):

> Airports and airlines are inextricably intertwined. The indissoluble nexus between them is the provision of commercial air transportation. Although airports may lease space to gift shops and airlines may publish in-flight magazines or own a chain of resort hotels, when it comes to the "program or activity" of providing air transportation to the traveling public, the two entities are so functionally integrated that they become one. While it *may* be the case * * * that the *airline* as a corporate entity does not become a federally-assisted "program" by virtue of its use of federally-assisted airports, its "program or activity" of providing commercial air transportation certainly does.

Accordingly, the court vacated the CAB's regulations insofar as they failed to apply to all commercial airlines and remanded the regulations to the Department of Transportation (the CAB's successor) for repromulgation in accordance with its opinion.[14]

The government's petition for rehearing and suggestion that rehearing be en banc were denied. Judges Bork, Scalia, and Starr dissented from the denial of rehearing en banc. In an opinion written by Judge Bork, the dissenters expressed the view that the panel's

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[14] Respondents also challenged two specific aspects of the Board's final regulations—the Board's definition of "qualified handicapped person" and a requirement that handicapped persons who require "extensive special assistance" notify the airlines 48 hours in advance of flight. These challenges were resolved in the Board's favor (App., *infra,* 62a-72a), and they are not pertinent to the issues before this Court.

decision could not be squared with this Court's decisions in *Grove City* and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (App., *infra*, 82a-83a (footnote omitted)):

> Under *Grove City*, the airlines here are clearly not "recipients" of federal funds. The airports are, and the ground activities of the airlines integral to the operation of the airport may be, subject to section 504. However, the non-airport activities of the airlines, such as in-flight procedures, are outside the scope of that section.
>
> The panel's attempts to distinguish this case from *Grove City* are wholly unpersuasive. It would unduly extend this dissent, however, to deal with those contentions in detail. The Supreme Court has been over this ground, and we ought to accept, rather than evade, its conclusion.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision that all commercial airlines, by virtue of their use of federally assisted airports, are thereby subject to regulation under Section 504 in their "program or activity" of "providing commercial air transportation" completely ignores the distinction between a "recipient" operating a federally assisted "program or activity" and a "beneficiary" of that assistance; disregards the "program specific" limitation on Section 504's coverage required by this Court's decisions in *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984); *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984), slip op. 11-12; and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 540 (1982); and conflicts with the decision of the Ninth Circuit in *Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202 (1984). Maintenance of the distinction between a "recipient" operating a federally

assisted "program or activity" and a "beneficiary" of that assistance, as well as the "program specific" mandate contained in the language of Section 504, is essential if Congress's expressed intent to impose some limits on the reach of the statute is to be respected. The court of appeals' decision, which distorts longstanding administrative interpretations of the key concepts at issue, requires the regulation of activities that the administering agencies have consistently regarded as beyond the purview of Section 504. Moreover, the recipient/beneficiary dichotomy and the program-specific limitation at issue in this case apply not only to Section 504, but also to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, and to a host of other general and specific revenue sharing statutes. See, *e.g.*, 31 U.S.C. 6716. Accordingly, the court of appeals' decision may well have substantial impacts beyond this case. Finally, the conflict within the circuits means that neither the Department of Transportation nor the airlines can be certain of their obligations under Section 504. In these circumstances, review by this Court is appropriate.

1. a. The court of appeals' conclusion that commercial airlines are "recipients" of federal financial assistance by virtue of their use of federally assisted airports totally obliterates any distinction between a "recipient" operating a federally assisted "program or activity" and a "beneficiary." The two are not the same. Section 504 prohibits those who receive federal financial assistance—*i.e.*, *recipients*—from discriminating in the conduct of assisted programs against the intended *beneficiaries* of that assistance. Importantly, however, the intended beneficiaries of the federal funding are not themselves regulated by the statute. See *Bob Jones University* v. *Johnson*, 396 F.

Supp. 597, 601 n.15 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Table).

In this case, airport operators clearly are "recipients" of funds extended under the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Tit. V, 96 Stat. 671 *et seq.*, and its predecessor statutes (see note 3, *supra*). Members of the travelling public, on the other hand, are "beneficiaries" of federal grants to airport operators, because the purpose of the federal grants is to benefit those who *use airports*. For the same reason, airlines using federally assisted airports are beneficiaries of grants to airport operators, but they are not, by virtue of use alone, "recipients" of federal financial assistance.

As Judge Bork recognized in his opinion dissenting from the denial of rehearing en banc, the court of appeals' approach to the "recipient" issue is boundlessly latitudinal (App., *infra*, 80a-81a):

> [The panel's] reading of section 504's statutory language would make every commercial enterprise a "recipient" of federal aid when it merely makes use of a service or facility that receives any federal assistance. That idea has great potential. Trucking and bus companies use federally constructed and maintained highways, and their businesses are thus inextricably intertwined with a federally assisted program. Many electric companies rely on dams constructed and maintained with federal funds. Without the National Weather Service farmers would be unable to plan, protect, and cultivate their crops in an effective manner. It ought surely to be true that federal funding of federal courts results in the regulation of law firms since courts are inextricably intertwined with and indispensable to lawyering.

There is no merit, therefore, to the court of appeals' rationale that an "indissoluble nexus" (App., *infra*, 50a) between airports and airlines transforms the airlines into "recipients" of grants to airport operators. Virtually the same argument would apply with equal force to all businesses that rely on air travel to sell goods and services in a nationwide market. Most if not all of the Nation's major corporations require extensive air travel by their personnel. Under the court of appeals' reasoning, those businesses, like the airlines, all would have to be treated as "recipients" of federal financial assistance. Yet Congress clearly did not intend that all those who rely on air travel be deemed "recipients" of federal financial assistance to airports.

b. The court of appeals also erred in holding that the services of federal air traffic controllers constitute federal financial assistance to airlines.[15] The

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[15] As previously noted (see page 16, *supra*), the court of appeals did not base its ultimate holding on this conclusion. Nevertheless, we believe that the issue is properly before the Court. The situation is comparable to that presented by *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982), in which the Court held that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, encompasses employment discrimination on the basis of gender, but declined to define the federally-funded program at issue (456 U.S. at 540). See also *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984), slip op. 11-12. Here, too, the court of appeals held that the air traffic control system constitutes federal financial assistance to all airlines within the meaning of Section 504, but declined to define the program or activity covered by that assistance. Thus, if this Court were to grant review and reverse only that part of the decision holding that federal assistance to airports requires airlines to comply with Section 504 in their "program or activity" of "providing commercial air transportation" (App., *infra*, 50a), the Department of Transportation still would be left with a holding that all airlines receive federal financial assistance within the meaning of Section 504 by virtue of their use of the air traffic control system. Although it would be open to the Department to define the relevant "pro-

legislative history of Title VI makes it clear that federally *conducted* programs—that is, programs funded solely by federal money—such as dams, harbors, or the air traffic control system—have *only* "beneficiaries"; there are no intermediate "recipients." As then-Deputy Attorney General Katzenbach explained (110 Cong. Reg. 13380 (1964) (footnote omitted)):

> Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc., are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal "assistance." While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI.

Stated differently, programs like the air traffic control system fall in the general category of "public goods"—goods and services from which all citizens and businesses benefit. The air traffic control system helps to ensure "safe skies." Arguably, this public benefit may "assist" airlines more directly than it assists other enterprises, yet it also assists all enterprises that use the airlines or fly private planes in the course of their business. It also protects those on the ground from plane crashes. It does not, however, constitute "Federal financial assistance" to anyone.

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gram or activity" in the first instance, it still would presumably be required to repromulgate the challenged regulations in some fashion. On the other hand, a decision by this Court that the air traffic control system is not federal financial assistance at all would obviate the need for further administrative and judicial proceedings regarding the scope of the "program or activity."

The court of appeals was able to reach a contrary conclusion only by distorting a consistent administrative interpretation of "Federal financial assistance" that dates back to 1964. The FAA's original Title VI regulations included the "*detail* of Federal personnel" as an example of "Federal financial assistance." 14 C.F.R. 15.23(3) (1965), 29 Fed. Reg. 19286 (1964) (emphasis added). DOT's current Title VI regulations continue the use of that phrase. 49 C.F.R. 21.23(c)(3). Clearly, the operation of the air traffic control system does not involve the "detail" of any federal personnel to the airlines. Indeed, as earlier noted (see page 22, *supra*), the air traffic control system is far more aptly described as a self-contained federally *conducted* program.

In 1978, the Department of Health, Education, and Welfare published guidelines for other agencies to follow in promulgating regulations under Section 504 (see note 10, *supra*). HEW's guidelines substituted the word "services" for "detail," so that "Federal financial assistance" under Section 504 included the "[*s*]*ervices* of Federal personnel." 43 Fed. Reg. 2137 (1978) (emphasis added). It is clear, however, that HEW did not intend by this change to work any substantive alteration in the definition of "Federal financial assistance" (43 Fed. Reg. 2132 (1978)):

> Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ.

When the Department of Justice assumed oversight responsibility for Section 504 (see note 10, *supra*), it retained HEW's definition of "Federal finan-

cial assistance," including the "[s]ervices of Federal personnel." 28 C.F.R. 41.3(e). Again, however, there is nothing to indicate that the term "services" of Federal personnel was to be construed any differently than the "detail" of Federal personnel. But only by concluding that the "services" of Federal personnel means something entirely different than the "detail" of Federal personnel was the court of appeals able to hold that the federally-operated air traffic control system constitutes federal financial assistance to airlines (App., *infra*, 39a-40a). The court clearly erred in disregarding the longstanding and consistent administrative interpretation of the agencies charged with administering Title VI and Section 504. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-7; *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

c. In *Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984), the court of appeals held that neither the use of federally-assisted airports nor the air traffic control system constitutes federal financial assistance to airlines within the meaning of Section 504. The court below did not discuss *Jacobson*, but it is clear that the two decisions cannot be reconciled. The result of the conflict is that neither the airlines nor the Department of Transportation can be certain of their obligations under Section 504. Consistency in the administration of this nationwide program requires resolution of the conflict.

The plaintiff in *Jacobson*, who was confined to a wheelchair because of cerebral palsy, challenged the airline's requirement that he sign a statement, in advance of flight, acknowledging the airline's right to refuse him passage or to remove him at any stop "if it becomes necessary for the comfort and safety of other passengers" (742 F.2d at 1204). The court of

appeals agreed that the airline had subjected him to unlawful discrimination, reasoning that the "anti-discrimination" clause of the Federal Aviation Act, 49 U.S.C. (1976 ed.) 1374(b), incorporated Section 504's basic prohibition against discrimination on the basis of handicap (742 F.2d at 1205).[16]

Having prevailed on his basic claim, plaintiff then sought attorney's fees. The request for fees required the court of appeals to determine whether plaintiff had stated a claim under Section 504 itself, because the Federal Aviation Act contains no fee-shifting provision. Considering arguments remarkably similar to those advanced by respondents in this case, the Ninth Circuit held that plaintiff had not stated a claim under Section 504 because the airline did not receive federal financial assistance (742 F.2d at 1208).

Although he apparently recognized that, in general, airlines, like other corporations and persons, are simply beneficiaries of government-supported services, the plaintiff in *Jacobson* argued that airlines benefit so much more than others from the use of federally assisted airports and the air traffic control system that they should be treated as recipients of federal financial assistance (742 F.2d at 1213). The court of appeals found it unnecessary to decide "whether a person can become subject to the Rehabilitation Act by benefiting to a substantially greater degree than the general public from services provided primarily for the general public" (*ibid.*). Instead, the court concluded that "even though air carriers benefit from

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[16] There is no indication that either the Ninth Circuit or the parties were aware of the fact that Section 404(b) of the Federal Aviation Act expired on January 1, 1983. See page 12, *supra*. In any event, the discrimination of which plaintiff complained occurred in 1980 (see 742 F.2d at 1204).

federal airport grants and federal air traffic control * * * to a greater degree than the general public, they also pay for those services, as Congress intended them to, to a greater degree than the general public does" (*ibid.*). This was so, the court concluded, because the trust fund from which grants to airport operators are made is supported in large part by taxes on aviation fuel, airplane tires and tubes, and other products used by the airlines (*id.* at 1213-1214). Because Congress established a user fee system under which the airlines were to pay for services rendered, the Ninth Circuit concluded that Congress could not simultaneously have intended that the airlines' use of federally assisted airports and the air traffic control system would constitute federal financial "assistance" (*id.* at 1215).[17] Accordingly, the court held that

[17] The Ninth Circuit recognized that the airport trust fund is supplemented as necessary with general tax revenues and that an FAA study prepared in 1978 reported that the airlines were not contributing to the trust fund to the same extent that they were benefitting from federal services (742 F.2d at 1214). For two reasons, these facts did not alter the court of appeals' conclusion that the airlines are not "recipients" of federal financial assistance. First, the court observed that "Congress might reasonably have concluded that the services provided by the FAA confer benefits on the general public over and above the benefits they confer on the users of the system," thus making it reasonable for the general public to bear some of the costs (*ibid.*). Second, the court deemed it irrelevant that, at any given point in time, airlines might be paying less than their "fair share" as calculated under a strict user fee system. Any temporary distortions meant only that the user fee system required fine-tuning to implement congressional intent; they did not suggest that Congress ever conceived of the airlines as "recipients" of federal financial assistance (*id.* at 1214-1215). Moreover, the court thought it would be anomalous for the determination of "recipient" status under Section 504 to vary from day to day, depending on "whether the congressionally mandated system is operating flawlessly or whether accountants' studies demonstrate that changes in allocation formulas are required" (742 F.2d at 1215 (footnote omitted)).

plaintiff had not stated a claim under the Rehabilitation Act and that he could not recover attorney's fees under that Act (*ibid.*).[18]

2. a. In deciding that the "program or activity" that is federally assisted in this case is the "provi[sion of] commercial air transportation" by all certificated carriers (App., *infra*, 50a), the court of appeals seriously misapplied this Court's decision in *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984). In *Grove City*, the Court reaffirmed the doctrine that where a statute prohibits discrimination in a "program or activity" receiving "Federal financial assistance," the reach of the statute is "program specific." See also *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984), slip op. 11-12; and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 539-540 (1982). Applying "program specific" reasoning to tuition grants, the Court held in *Grove City* that Congress did not intend the Department of Edu-

[18] We note that the Ninth Circuit's reasoning in *Jacobson* is by no means the only route to a conclusion that a "beneficiary" of federal services is not a "recipient" of federal financial assistance. Indeed, most beneficiaries of federal financial assistance are in quite a different position than the airlines—like the students receiving tuition grants in *Grove City*, beneficiaries generally pay little or nothing for the benefits they receive. It does not follow, however, that they should be treated as "recipients" of federal financial assistance. Stated simply, "beneficiaries" of federal financial assistance are those that Congress intended to benefit; they are not, however, those that Congress intended to regulate. "Recipients," on the other hand, are the entities that are carrying on an assisted "program or activity" with the help of federal aid, and it is the receipt of that federal aid that subjects them to regulation in the conduct of such a "program or activity."

cation (or the courts) to attempt to trace federal money "from classroom to classroom, building to building, or activity to activity." *Grove City*, slip op. 17. The obvious purpose of tuition grants, the Court found, was to assist a school's financial aid program. *Ibid.* Accordingly, receipt by the school (or its students) of tuition grants meant that only the school's financial aid program was subject to regulation under Title IX. *Ibid.*

Thus, the clear teaching of *Grove City* is that the boundaries of a federally assisted program or activity are defined by the underlying grant statute. Grants under the Airport and Airway Improvement Act (and its predecessor statutes) are made to airport operators to support "program[s] or activit[ies]" involved in running an airport.[19] The grant statute provides, in general terms, for the construction and improvement of *airports* and associated *ground* facilities; it furnishes no funds whatever for the purpose of transporting people from one place to another. (It is undisputed in this case that not one penny of federal funds is given to airlines under the Airport and Airway Improvement Act or its predecessor statutes.) Accordingly, it is clear that all federally assisted activities *at* airports, including the *ground operations* (*e.g.*, ticketing and baggage handling) of all airlines using such airports, are indeed subject to Section 504. See 49 C.F.R. Pt. 27, 44 Fed. Reg. 31442 *et seq.* (1979) (DOT's Section 504 regulations). But it is equally clear that Section 504's

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[19] As the court of appeals recognized (App., *infra*, 46a (footnote omitted)), the grants are used for such purposes as "airport land acquisition, runway construction, passenger terminals, airport lighting, airport access and service roads, electronic and visual approach aids, taxiway construction, obstruction removal, and fire/rescue equipment and buildings."

coverage cannot extend beyond the program or activity conducted by or under the auspices of the grant recipient. Neither the agency granting funds to airport operators nor the airport operators themselves have the authority under Section 504 to regulate an airline's practices on board its planes, because air transport is simply not within the scope of the grant program. Contrary to the court of appeals' view that it would be "nonsensical" to distinguish between an airline's activities *at* the airport and its activities on board its planes (App., *infra*, 47a), we submit that such a distinction is the only interpretation consistent with the program-specific limitation on coverage mandated by this Court's decision in *Grove City*. Simply stated, Section 504 is inapplicable to the "program or activity" of "providing commercial air transportation" (App., *infra*, 50a) unless and until Congress furnishes the airlines with federal financial assistance for *flying*.

b. As was the case with its analysis of the air traffic control system (see pages 23-24, *supra*), the court of appeals was able to conclude that the on-board activities of commercial airlines are a federally assisted "program or activity" only by distorting two decades of consistent administrative interpretation. The history of the Section 504 regulations, set forth at pages 4-13, *supra*, demonstrates that the regulatory agencies never understood Title VI to reach the on-board activities of airlines not receiving subsidies from the CAB. Regulation of such activities was to be accomplished, however, under Section 404(b) of the Federal Aviation Act, which had been judicially interpreted to prohibit racial discrimination in air travel. See note 8, *supra*. It is true that both DOT and the Board initially expected the Board to promulgate regulations prohibiting all certificated

carriers from discriminating against handicapped air travellers; this was to be accomplished, however, through renewed reliance on Section 404(b), and not Section 504 alone. But the congressionally mandated "sunset" of Section 404(b) made it impossible for the Board to carry out its original intent to write regulations that would cover both subsidized and non-subsidized carriers. The court of appeals erred in failing to acknowledge that, with the expiration of Section 404(b), the Board lost the authority it intended to invoke to issue the all-encompassing regulations mandated by the court. Neither DOT nor the Board ever expressed the view that Section 504 alone provided the Board with such sweeping authority, and the court of appeals should have respected the agencies' determination of their own jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1055

PARALYZED VETERANS OF AMERICA,
AMERICAN COALITION OF CITIZENS WITH DISABILITES,
AMERICAN COUNCIL OF THE BLIND, PETITIONERS

v.

CIVIL AERONAUTICS BOARD,
FEDERAL AVIATION ADMINISTRATION,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENTS

REGIONAL AIRLINE ASSOCIATION, INTERVENOR

Petition for Review of an Order of the
Civil Aeronautics Board

Argued October 31, 1983

Decided January 18, 1985

Before: WALD and MIKVA, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

BAZELON, *Senior Circuit Judge*: Petitioners Paralyzed Veterans of America (PVA) and other organizations representing disabled citizens [1] challenge final regulations of the Civil Aeronautics Board (CAB or Board) implementing section 504 of the Rehabilitation Act of 1973 (the Act) with respect to commercial airlines.[2] The regulations were designed to prevent discrimination against handicapped persons in air transportation. The most important issue presented by this case concerns the scope of the CAB's Amended Final Rule, which the Board has applied only to certain small airlines receiving direct federal subsidies. Petitioners maintain that the Board is required by law to apply its regulations to all commercial air carriers. We agree. As to the substance of those regulations, however, which petitioners challenge on account of the CAB's definition of "qualified handicapped individual" and aspects of its 48-hour advance notice

[1] Joining PVA as petitioners in this case are the American Coalition of Citizens with Disabilities, Inc., a nationwide coalition of 127 organizations representing all major disability groups, and the American Council of the Blind. PVA is comprised of veterans of the United States Armed Forces who have suffered spinal cord injury or disease.

[2] Joining respondent CAB in this case are the Federal Aviation Administration and the United States Department of Transportation. Intervenor in this case on behalf of respondents is the Regional Airline Association, the trade association of the regional/commuter air carrier industry, representing approximately 130 airline members. Because the CAB ceased operations on December 31, 1984, pursuant to the Airline Deregulation Act of 1978 and the Civil Aeronautics Board Sunset Act of 1984, *see infra* notes 212-214 and accompanying text, references in this opinion to the CAB or Board should be construed, where appropriate, to include the CAB's successor agency, the Department of Transportation.

provision, we find respondents' position more persuasive. Accordingly, we vacate the regulations in part and remand them in part.

I. BACKGROUND

A. *From Statute to Rulemaking*

Section 504 of the Rehabilitation Act of 1973 (section 504) provides:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[3]

As enacted, the statute did not provide for administrative implementation of section 504's mandate; it was silent as to the exercise of regulatory authority.[4] In 1976, however, the President issued Executive Or-

[3] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (Supp. V 1981)). Title V of the Act also required federal agencies and federal contractors undertaking contracts in excess of $2,500 to take affirmative action to employ handicapped individuals. Sections 501, 503, 29 U.S.C. § 791. In addition, and of considerable relevance to the case before us, *see infra* notes 150, 154, 174 and accompanying text, section 502 established the Architectural and Transportation Barriers Compliance Board in an effort to lower the "architectural, *transportation* and attitudinal barriers" confronting handicapped citizens. 29 U.S.C. § 792 (emphasis added).

[4] *See* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 411-12 (1984).

der 11,914, requiring the Secretary of Health, Education and Welfare (HEW) to coordinate the implementation and enforcement of section 504 by all federal agencies.[5] In 1977, prodded by an order of our district court,[6] HEW did adopt regulations implementing section 504 as it applied to those programs and activities for which HEW was itself a source of federal financial assistance.[7] Finally, on January 13, 1978, the Secretary of HEW issued guidelines directing other federal agencies to begin their own rulemaking proceedings within ninety days and to issue final regulations no later than one hundred thirty-five days following the close of the comment periods for the proposed rules.[8]

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[5] Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976).

[6] Cherry v. Mathews, 419 F. Supp. 922 (D.D.C. 1976). The court found "that Congress contemplated swift implementation of § 504 through a comprehensive set of regulations." *Id.* at 927.

[7] *See* 42 Fed. Reg. 22, 676 (1977); *see also* Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing Section 504 of the Rehabilitation Act of 1973,* 6 FORDHAM URB. L. J. 399 (1978); Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulations,* 16 HARV. J. ON LEGIS. 59 (1979).

[8] Implementation of Executive Order 11,914, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 43 Fed. Reg. 2132, 2137 (1978) (codified at 45 C.F.R. § 85 (1982)). When Congress divided HEW into two new agencies in 1979, both the Department of Education and the Department of Health and Human Services (HHS) republished regulations implementing section 504 within the agencies themselves. Authority for coordinating the implementation and enforcement of section 504 throughout the executive branch was transferred first to HHS, then to the Department

The Civil Aeronautics Board commenced its rulemaking proceedings on June 6, 1979.[9] Because of the complexities of the issues in this case, both jurisdictional and substantive, it will be helpful to summarize those proceedings in considerable detail.

In its Notice of Proposed Rulemaking the Board proposed "new rules to prohibit unlawful discrimination against disabled travelers and to implement section 504 of the Rehabilitation Act of 1973."[10] Although the CAB noted that "[t]his proceeding began at the Board's initiative and with a petition for rulemaking filed by the National Federation of the Blind,"[11] petitioners observe, and respondents do not dispute, that "the Board's initiative" was prompted at least in part by pressure from HEW Secretary Joseph Califano.[12] In its discussion of the

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of Justice, where it currently resides. *See* C.F.R. § 41 (1982) (guidelines published by Department of Justice pursuant to Exec. Order No. 12,250, 3 C.F.R. 298 (1981)). The original guidelines promulgated by HEW to assist other agencies in implementing section 504 are now deemed to have been issued by the Attorney General and it is clear, as one commentator has noted, that "[i]n the future the Department of Justice will play a leading role in the interpretation of § 504." Wegner, *supra* note 4, at 417 n.42.

[9] Notice of Proposed Rulemaking, Part 382, Nondiscrimination on the Basis of Handicap, 44 Fed. Reg. 32,401 (1979) [hereinafter cited as Proposed Rule].

[10] *Id.*

[11] *Id.*

[12] As the proceedings continued, further prompting was apparently necessary before the Board would adopt final rules. In addition to Secretary Califano's letter of January 29, 1979 urging the CAB to give the matter a high priority, the Board's slow pace elicited a formal request from the White House in

proposed new rules' "Introduction and Background," however, the Board's position was a strong one:

> A review of the problems that have been presented to the Board regarding difficulties encountered by handicapped persons in air transportation demonstrates not only a need for regulations under section 504 of the Rehabilitation Act, but also a significant need for the handicapped to receive adequate, nondiscriminatory service in air transportation in general. . . . Therefore, we have decided that the scope of this rulemaking should include any discrimination against passengers and prospective passengers on the basis of a handicapping condition, and the availability of adequate, reasonable service to handicapped persons. We believe that the burden of showing that airline service to handicapped persons cannot be provided should be on the air carrier.[13]

Also included in the Board's "Introduction and Background" discussion were several important references to the agency's statutory authority. First, the CAB wished to "emphasize that the handicapped are protected by the adequacy of service and anti-

November, 1980 that the CAB's section 504 obligations be fulfilled. "When the CAB still had not issued final rules by July 2, 1981, a district court ordered the agency to inform all of its subsidized carriers of their obligation to comply with the requirements of Section 504. *Paralyzed Veterans of America, et al. v. William French Smith, et al.*, No. 79-1979 (C.D. Cal. July 2, 1981). The CAB complied with this order by sending a letter on June 12, 1981 to all carriers receiving federal payments under Section 419 of the Federal Aviation Act." Petitioner's Brief at 7 n.4 [hereinafter cited as PVA Brief].

[13] Proposed Rule, 44 Fed. Reg. 32,401 at 32,402.

discrimination provisions of section 404 of the Federal Aviation Act [49 U.S.C. § 1374], which are applicable to all air carriers, whether or not receiving Federal financial assistance."[14] It relied upon this fact as a partial justification for declining to propose any regulation of airline employment practices, noting that other agencies, such as the Department of Labor or the Justice Department, would have "the experience and skill necessary to do the job effectively."[15] Moreover, the CAB reasoned:

> The Board extends direct Federal subsidies only to a small number of air carriers, so that the reach of our section 504 jurisdiction would not have a significant effect on industry employment. While we can prevent discrimination in air transportation under section 404 of the Federal Aviation Act without clear section 504 jurisdiction, the same is not true of employment. The Board would have no authority to regulate employment practices of unsubsidized carriers unless those practices somehow caused discrimination in transportation.[16]

The CAB's initial efforts to implement section 504 were further constrained by its decision "not to propose to require structural modifications of aircraft at this time" on the ground of its having insufficient information regarding alternatives, costs, and benefits.[17] Nevertheless, the Board proposed, and in-

[14] *Id.* at 32,401-02.

[15] *Id.* at 32,402.

[16] *Id.*

[17] *Id.* Some implications of this limitation pertaining to recent case law in this area are discussed *infra* at note 155.

vited public comment upon, regulations that would apply "to all certificated carriers and air taxis [commuter carriers] in their operations with aircraft of more than 30-seat passenger capacity." [18] Conceding that "some aspects of the rules would merely make explicit what is already implicitly required by section 404," [19] and that they might prove too burdensome or impractical for certain small carriers, the Board went on to suggest regulations that it believed

> strike a reasonable balance among the interest of handicapped persons in the greatest possible convenience and freedom of choice in their use of air transportation services, the legitimate requirements of air safety, and the economic reality that costs incurred by carriers will be passed on to consumers in the form of higher air fares, or to the handicapped in the form of special charges.[20]

B. *The Proposed Rules: Substance and Scope*

The regulations developed by the CAB were tripartite. Subpart A—"General Provisions"—prohibited "discrimination in air transportation against qualified handicapped persons." [21] It stated that the CAB's purpose in adding a new Part 382—"Nondiscrimination on the Basis of Handicap"—to Chapter II of Title 14, Code of Federal Regulations was

> to ensure: (a) That handicapped persons receive reasonable access to commercial air transportation, (b) that certain specific practices are prohibited, and (c) that certain specific changes in service are made. The part is designed to ensure that transportation of handicapped persons is integrated into the overall air transportation system as much as possible.[22]

[18] *Id.*

[19] *Id.*

[20] *Id.* at 32,402-03.

[21] *Id.* at 32,405.

Section 382.4 of Subpart A—a single sentence titled "Prohibition against discrimination"—provided:

> A carrier shall not, on the basis of handicap, exclude any qualified handicapped persons from participation in, deny them the benefits of, or otherwise subject them to discrimination in the provision of air transportation or related services.[23]

Section 382.5 of Subpart A prohibited air carriers from providing "different or separate" transportation services to qualified handicapped persons, or from denying any services available to other passengers, unless such actions were "reasonably necessary." [24] Subpart A left the specific words "reasonably necessary" undefined, but did, in section 382.3, define the terms "Carrier," [25] "Conditions for air

[22] *Id.*

[23] *Id.* at 32,406.

[24] *Id.* Section 382.5(a) permits different or separate service if "reasonably necessary to provide a qualified handicapped person with access to air transportation or related services or if requested by such a person." Section 382.5(b) permits carriers to deny transportation or services available to other passengers if "such action is reasonably necessary to accommodate the handicapped passenger in order to comply with the conditions for air transportation." *Id.*

[25] In this Notice of Proposed Rulemaking, the CAB defined "carrier" as including "(1) any holder of a certificate of pub-

transportation,"[26] "Facility,"[27] "Handicapped person,"[28] and "Qualified handicapped person,"[29] each of which assumes considerable significance in the controversy before us.

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lic convenience and necessity issued by the Board authorizing the transportation of passengers, and (2) any air taxi operator" using aircraft seating more than thirty passengers. Although the Notice was explicit about its applicability "to all certificated carriers," i.e., major commercial airlines, it specifically invited comment on the subject of commuter carriers; indeed, it included language for an alternative regulation that would *not* routinely exempt aircraft with fewer than thirty seats. *Id.* at 32,405.

[26] To be "qualified," a handicapped person was required to satisfy these conditions, defined as:

> the tender of payment for air transportation, the absence of any indication that air transportation of the passenger will jeopardize flight safety, and the absence of any indication that the passenger is unwilling or unable to comply with reasonable requests of airline personnel. Any request of airline personnel that is inconsistent with this part will not be considered reasonable for the purposes of this definition.

Id.

[27] " 'Facility' means all or any portion of a carrier's aircraft, buildings, structures, equipment, roads, walks, parking lots, and other real or personal property, normally used by passengers or prospective passengers, or interest in such property." *Id.*

[28] " 'Handicapped person' means a person who (i) has a physical or mental impairment that substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.*

[29] " 'Qualified handicapped person' means a handicapped person who has satisfied all the conditions for receiving air transportation services ('conditions for air transportation') that are required for the non-handicapped." *Id.* at 32,405-06.

Subpart B—"Specific Requirements"—provided detailed guidelines to be followed by each carrier with regard to accessibility of facilities and services,[30] the availability of information,[31] refusal of service,[32]

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[30] As to accessibility, § 382.10 did not require "that every facility or every part of the facilities for each flight be made accessible to or usable by handicapped persons," but did mandate that "[e]ach carrier's facilities and services, when viewed in their entirety, shall be reasonably accessible to and usable by handicapped persons." *Id.* at 32,406.

[31] Paragraph (a) of § 382.11 required that carriers "establish a method for ensuring that deaf passengers receive necessary information in emergencies" and that necessary information be provided "in a timely manner . . . by use of written material, signs, placards, flashing signal lights, or other means." *Id.* Paragraph (b) provided that any information available to passengers on printed emergency cards must also be made available to blind passengers in Braille. *Id.*

[32] Appropriately, the "refusal of service" regulations of § 382.12 were the most lengthy and detailed of any in the Notice. Although they explicitly granted carriers the right to refuse transportation to "handicapped persons who are intoxicated by alcohol or drugs, who are seriously ill with a condition that may require immediate treatment, who have a contagious disease, who would endanger flight safety, or whose condition results in disruptive behavior by the handicapped person," § 382.12(a), they equally explicitly established the following presumption and elaborated upon its proper application in practice:

> Handicapped persons shall be presumed to meet all conditions for the provision of air transportation. A carrier shall not refuse transportation to a handicapped person in accordance with this paragraph unless it reasonably believes that the person does not meet those conditions. If the handicapped person presents a medical certificate from a licensed physician that the person is eligible for

guide dogs,[33] the use of Braille,[34] and service to be provided to incontinent passengers and to passengers unable to feed themselves.[35] Subpart B also specif-

> air transportation, a carrier shall not refuse transportation without compelling evidence to the contrary.

Id.

Paragraph (b) of § 382.12 permitted carriers to require that a personal nurse or attendant accompany "a handicapped person who needs extraordinary care during flight" or who "would need substantial assistance to deplane in an emergency" or who would necessarily, because of the aircraft's structure, "obstruct the emergency deplaning of other passengers." The paragraph pointedly provided, however, that a carrier "shall not require persons who are blind or deaf but not both, or persons who are unable to walk but who can deplane reasonably expeditiously in an emergency by using their arms, to have attendants for that reason." *Id.*

[33] Blind and deaf passengers were permitted by § 382.13, "Guide dogs and personal equipment," to be accompanied on aircraft by guide dogs, and to use canes or crutches and "to keep those aides near them at all times." Paragraph (c) of § 382.13 further required carriers to permit handicapped persons to take folding wheelchairs aboard and to stow the wheelchairs in the passenger compartment, and paragraph (d) required carriers to "accept as baggage battery-powered wheelchairs and personal oxygen supplies of handicapped passengers" to the extent that such storage and baggage-carrying did not violate Federal Aviation Regulations or Department of Transportation regulations for the transportation of hazardous materials (49 C.F.R. Parts 172, 173, and 175). *Id.*

[34] *See supra* note 31.

[35] According to § 382.12(c):

> A carrier shall not refuse transportation to, or require attendants for, persons because they are unable to feed themselves, if they elect not to eat during the flight. A carrier shall not refuse transportation to or require attendants for, persons because they are incontinent or

ically prohibited carriers from conditioning the carriage of handicapped passengers or their baggage, including wheelchairs, on any waiver of liability for personal injury or property damage and forbade "any limitation of liability that is stricter than the limitations applied to all passengers and baggage." [36] That section of Subpart B with which the instant case is most concerned, however, and which serves as an important illustration of the specificity and detail of the regulations at issue, was section 382.14, "Availability of services and equipment," providing in pertinent part as follows:

> (a) Carriers shall ensure the availability of:
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> (1) Necessary life-support systems, such as oxygen, for on-board use; and
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> (2) Personnel and equipment to assist in boarding, moving to restrooms, deplaning, baggage handling, and making ground connections, including ground wheelchairs, aisle chairs and, if necessary, mechanical boarding lifts.
>
> (b) Carriers shall not establish advance notice requirements for the provision of special assistance unless that assistance is extensive. Carriers may establish reasonable advance notice

> persons who are unable to use the restrooms without assistance, if they have made adequate alternative arrangements for waste disposal.

Id.

[36] Exceptions to these prohibitions were contained in § 382.15(b), which permitted carriers to "insist upon a waiver of liability for injury that: (1) Results from a handicap traveling with which presents an extraordinary hazard, and (2) Occurs despite the exercise of due care by the carrier." *Id.* at 32,407.

requirements of up to 48 hours for the provision of extensive special assistance. For the purposes of this paragraph, carrier-provided wheelchairs, oxygen for on-board use, and mechanical boarding lifts will be considered extensive special assistance.[37]

Subpart C of the regulations initially proposed by the Board—"Compliance"—mandated that each carrier provide formal assurances to the CAB "that it will comply with this part" [38] and specified the means for so doing. Each carrier, for example, was required to "maintain an employees' manual containing company rules for accommodating handicapped passengers," [39] to formally designate "at least one person . . . to coordinate its efforts to comply with

[37] *Id.* at 32,406. Additional paragraphs of § 382.14 permitted carriers to charge handicapped passengers "the costs of the assistance including a reasonable profit," § 382.14(c), and enjoined carriers from forcing special assistance upon a handicapped person "who does not request it, unless the assistance is reasonably necessary to physically accommodate the passenger or to enable the passenger to meet the conditions for air transportation," § 382.14(d). *Id.* Supplementing § 382.14's definition of "extensive special assistance," the Subpart B guidelines on "refusal of service" provided in § 382.12(d) as follows:

> A carrier may refuse transportation to a person who will need extensive special assistance from the carrier, such as the provision of wheelchairs, oxygen, or mechanical boarding lifts, if the person fails to comply with advance notice requirements established by the carrier in accordance with § 382.14(b).

Id.

[38] *Id.* at 32,407 (§ 382.20).

[39] *Id.* (§ 382.21).

this part," [40] and not only to "[e]valuate its current policies and practices and effects for compliance" but also to "[e]stablish a system for periodically reviewing and updating the evaluation." [41] The requisite "evaluation and modification of practices" was to include "a reasonable effort to consult with and obtain the views of handicapped persons and experts on handicapping conditions." [42]

In addition, under Subpart C, every carrier was required, within 180 days after the effective date of the proposed regulations, to "adopt a plan that provides for the prompt and equitable resolution of complaints alleging any action prohibited by this part . . . ." [43] Such a complaint might be filed by any person who believed "that he or she has been a victim of discriminatory action" by a carrier.[44] Finally, section 382.26 of Subpart C, Procedures for noncompliance," authorized the Director of the Bureau of Consumer Protection to institute enforcement proceedings. If, after notice and opportunity for a hearing, such proceedings "[f]ound a failure by the carrier to comply with a requirement of this part," the Board was empowered to "order suspension or termination of, or refuse to grant or continue Federal financial assistance" to the offending carrier, or to "use any other means authorized by law to ensure compliance." [45]

[40] *Id.* (§ 382.23).

[41] *Id.* (§ 382.22).

[42] *Id.*

[43] *Id.* (§ 382.24).

[44] *Id.* (§ 382.25).

[45] *Id.* (§ 382.26).

In response to its request for comments on its proposed regulations, the CAB received a large number of suggestions and criticisms from airlines, airline trade associations, flight crew unions, government agencies, disabled individuals and organizations representing handicapped persons, including petitioners.[46]

C. *The Final Rules: Comment, Compromise, and Constriction*

In general, the airlines objected to the adoption of the proposed regulations, arguing that such rules were inconsistent with recent congressional initiatives aimed at reducing regulation of the air transport industry and that they were unduly burdensome and duplicative.[47] At least one commenting airline contended "that unjust discrimination on the basis of handicap does not exist" and that the proposed rulemaking of the Board was not only "unnecessary" but "would cause confusion and ambiguous interpretation with the undesired result of diminished spe-

[46] Additional groups included the National Association of the Deaf, the National Capital Chapter of the National Multiple Sclerosis Society, the Disability Rights Center, the National Center for Law and the Deaf, and the National Association for Retarded Citizens.

[47] American Airlines argued, for example, that "[t]he FAA currently enforces its own regulations regarding accommodating handicapped travelers. These regulations are both comprehensive and reasonable. There is no need, therefore, for the Board to involve itself in duplicating the efforts of the FAA, particularly when it lacks the FAA's technical expertise." Comments of American Airlines, Inc. before the Civil Aeronautics Board, Aug. 31, 1971, J.A. at 154, 156; *see also* Respondents' Brief at 10.

cial service to handicapped persons."[48] While representatives of commuter airlines could see some merit in the proposed regulations as they applied to the large certificated carriers, they concluded that "if applied to commuter air carriers, [the rules] would result in a substantial burden on such carriers. The mere recitation of the detail and scope of the proposed requirements is staggering."[49] The larger airlines, through the comments of the Air Transport Association and several individual companies, contended not only that the proposed regulations were "redundant, confusing, and, in some cases, conflicting," but that the CAB was without jurisdiction to apply them to any airlines but those few (generally smaller ones) that received direct money subsidies from the Board.[50]

This jurisdictional contention was vigorously opposed by groups representing handicapped citizens, all of which supported the CAB's initial assertion of rulemaking authority over every certificated carrier. As to the scope of rulemaking, these groups criticized the agency, if at all, for its tentative proposal to exempt from its regulations those small commuter or air taxi operators using aircraft of fewer than thirty seats.[51] Although the substantial submission of the

[48] Comments of Pacific Southwest Airlines before the Civil Aeronautics Board, Sept. 4, 1979, J.A. at 137, 139.

[49] Comments of Commuter Airline Association of America, Inc. before the Civil Aeronautics Board, Sept. 4, 1979, J.A. at 98, 102.

[50] Nondiscrimination on the Basis of Handicap, Final Rule, 47 Fed. Reg. 25,936 (1982) (codified at 14 C.F.R. Part 382) [hereinafter cited as Final Rule].

[51] *See, e.g.,* Comments of PVA before the Civil Aeronautics Board, Sept. 5, 1979, J.A. at 83, 85 (citing the increasing

Disability Rights Center and eight other groups[52] did address the legal issue of the proper reach of section 504—arguing that all airlines, whether subsidized or not, received "federal financial assistance" in the form of development grants to airports, the federal air traffic control system, exclusive operating certificates, and special investment tax credits—the vast majority of comments were directed to the substance of the rules themselves.[53]

In this regard the rulemaking proceeding below appears to have been an exemplary one. The record contains many examples of difficult and sensitive issues being painstakingly resolved, of diverse viewpoints being conscientiously considered. For example, the Board redrafted its rules to eliminate any reference to medical certificates,[54] agreeing with commenters representing the disabled who argued that terms like "reasonable belief" and "compelling evidence" were too vague, that travelers were the best judges of their own medical status and ability to fly as far as their own risk was concerned, and that the requirement might discriminate in practice between those in whom a handicap was apparent and those in whom it was not.[55] In cases where risks to other

frequency of such flights, noting their importance in making mid-route connections, and arguing that "[a]t most, these carriers should be individually and temporarily exempted"); regarding the CAB's concern on this score see note 25, *supra*.

[52] These included the three petitioners in this case and the groups enumerated in note 46 *supra*.

[53] *See* J.A. at 111; Final Rule, 47 Fed. Reg. at 25,937.

[54] *See supra* note 32.

[55] Final Rule, 47 Fed. Reg. at 25,942 (discussing proposed § 382.12 (now § 382.13)).

passengers are potentially involved, however, such as where "the likelihood that aggravation of the passenger's condition will cause an in-flight emergency or unscheduled landing," the Board concluded "that airlines must make determinations of flight worthiness."[56] This was to be accomplished not on the basis of a required medical certificate from "passengers' doctors [who, the airlines contended] are generally inexpert in aerospace medicine, and, therefore, unqualified to determine whether the passenger can fly" but rather "on the basis of standards clearly related to flight safety, applied in a nondiscriminatory manner by personnel who are assigned specific responsibility for this task."[57]

In general the Board's response to the comments it received upon specific provisions of the proposed rules resulted in its granting enhanced discretion to the regulated carriers. For example, a proposed rule requiring Braille information cards[58] was dropped in favor of a section that, according to the Board, "now clearly states the airlines' obligation to provide both emergency and important non-emergency information to blind or deaf passengers, but allows more flexibility in choosing methods for providing it."[59] Similarly, in dismissing the objection of several commentators to the use of the phrase "reasonably accessible" in sections 382.1 and 382.11 of the proposed rules rather than of the words "readily accessible" (the standard of the HHS guidelines in 14 C.F.R. § 85.57 (a)), the Board concluded that its original language

[56] *Id.*

[57] *Id.*

[58] *See supra* note 31.

[59] Final Rule, 47 Fed. Reg. at 25,941.

reflected "the accessibility standard most appropriate to the airline industry." [60] In such areas of evident concern to handicapped persons as the storage of blind travelers' canes [61] and in-flight wheelchair policy,[62] the Board's decisionmaking resulted in Final

[60] *Id.* at 25,940.

[61] "The question of whether a blind person may have his cane during flight," according to a "Fact Sheet" submitted to the Board by the National Federation of the Blind, "is no exception to th[e] chaotic configuration of procedures and practices by the airlines." Noting that many airlines treated canes as any other carry-on baggage to be stowed at the discretion of the carrier, the Federation noted that "[t]he white cane is of functional necessity to its owners just as the guide-dog is inextricably bound to its master," placing it "entirely out of the category of portable hardware when it comes to the importance that the white cane holds for blind persons. The white cane represents one of two full-proof methods of independent travel for the blind, and is therefore symbolic of the mobility and self-sufficiency which blind people strive for. Stowing a blind person's cane in some far-off closet is not like doing so to another person's extra clothes bag." J.A. at 174.

On this subject, the Board, in explaining its Final Rule, noted that the "primary authority" on the matter was the Federal Aviation Administration [FAA], which "has considered the air safety implications" [45 Fed. Reg. 75,138 (1980)] and "determined that the stowage of travel canes under passenger seats is consistent with its safety mandate provided that the cane is placed flat on the floor and does not protrude into an aisle or exit row." The Board therefore amended its Final Rule § 382.14[b] to require carriers to permit stowage of travel canes whenever the FAA's conditions can be met. Final Rule, 47 Fed. Reg. at 25,943-44.

[62] The proposed rules would have required airlines to carry folding wheelchairs in the passenger compartment if permissible under FAA and Department of Transportation [DOT] regulations—a proposal that was warmly embraced by commenters representing the handicapped and strongly criticized

Rules that appear to have successfully balanced the felt necessities of the handicapped with the requirements of the airlines for flexibility and the need for deference to the expertise of agencies that are charged more directly with ensuring the safety of air transportation.[63]

by the airlines, flight attendants' unions, and the Aerospace Industries Association. The critics contended that passenger-area storage space was too limited and that folding wheelchairs could be "doortagged" (taken from the passenger and stored in the plane's belly just before boarding and returned just after deplaning). Advocates of the proposed rule, however, argued that chairs were more likely to be damaged by such a procedure and that passenger-compartment stowage was much less uncomfortable because it permitted use of a personal chair for the longest possible time. *Id.* at 25,944.

In its Final Rule, the CAB decided "that airlines need more flexibility" and modified its proposed rule "to require carriers to make reasonable efforts to provide passenger-area storage, and otherwise to doortag," stating its expectation that airlines would make "good faith efforts to accommodate folding wheelchairs in the passenger compartment when possible." *Id.* On the other hand, the Board refused to cede to the airlines' request that it further relax its proposed § 382.13(d), which required airlines to carry battery-operated wheelchairs in the baggage compartment to the extent permitted by DOT rules on the carriage of hazardous materials. It noted that any need for more flexibility here was offset by the "strong countervailing interest" of the handicapped traveler's access to such "extremely important belongings." *Id.*

[63] A final illustration involves paragraphs (b) and (c) of proposed § 382.12 (now § 382.13), which permitted airlines to require handicapped passengers to travel with attendants when nursing or other extensive personal care would be necessary during flight and when a passenger would require assistance to exit during an emergency. Responding to comments seeking greater specificity in the rules, the Board in its Final Rule sought to "make clear that minor assistance with meals, such as opening silverware packages or telling a

Nevertheless, the Board's determinations regarding two specific aspects of the Final Rules have been challenged by petitioners in this case. The first involves the CAB's definition, in its Amended Final Rule, of "Qualified Handicapped Person," to which

blind passenger what is being served and where each item is located on the tray, should not be considered feeding assistance requiring a passenger to travel attended or forego food." *Id.* at 25,942. Otherwise the Board relied on what it in another context termed the airlines' "courtesy and common sense." *Id.* at 25,941. Thus:

> The normal range of flight attendant services, including the occasional modest extra efforts provided for some passengers—escorting them to seats, providing games to restless children, soothing first-flight anxieties—can be easily distinguished from the kind of time-consuming attention or specialized services (such as administering injections or assisting a passenger in the lavatory) that passengers would not expect as a matter of course.

Id. at 25,942.

As to the requirement of an attendant when necessary for emergency deplaning, the Board concluded that airlines should be permitted to require this "substantial logistical and financial barrier to travel," *id.*, only "when reasonably necessary for the safety of other passengers, in accordance with the regulations and policies of the FAA." *Id.* at 25,943. Noting that the FAA had still not resolved the question to its own satisfaction, but had found in a preliminary study that " 'the potential for handicapped passengers delaying aircraft evacuations would appear minimal,' " the Board concluded that

> [a]s with decisions on refusing service, decisions requiring attendants must be made by designated personnel. The name of the designated person must be made known to any person that requests it. Additionally, we will expect airlines to be able to provide specific justifications for their determinations that safety requires a passenger to be attended.

Id.

petitioners object on two grounds: that it "unlawfully allow[s] airlines to selectively impose requirements on disabled passengers which are not required of all other passengers" and that it lacks "objective guidelines and criteria to ensure that airlines do not arbitrarily impose unnecessary conditions on disabled passengers," thus rendering the definition "vague and confusing for both airline personnel and disabled travelers." [64] Petitioners' second specific objection is to section 382.15(c) of the Final Rule, which allows airlines to require all passengers who will need "extensive special assistance" to notify the airline 48 hours in advance of their flight.[65] This provision, petitioners contend, is "especially arbitrary" and "overly broad" and "inconsistent with Section 504" because it would permit airlines "to circumvent their Section 504 responsibilities." [66]

A discussion of the administrative background of these disputed sections of the Final Rule, and of the arguments advanced for and against their validity by the parties to this case, is best deferred until a

[64] PVA Brief at 51. When its Final Rule was published, the Board noted that "[i]n order to aid in any revisions or analysis that may be necessary, we are leaving this rulemaking docket open for further comments on possible changes . . . . 42 Fed. Reg. at 25,948. Such comments were in fact received from the Department of Justice and several groups representing the handicapped, resulting in some minor changes discussed *infra* at note 179. The amendments, characterized by the CAB as "interpretative" and promulgated without notice or public comment, were published on November 18, 1982. Nondiscrimination on the Basis of Handicap, Amendment No. 1 to Part 382, 47 Fed. Reg. 51,857 (1982) [hereinafter cited as Amended Final Rule].

[65] PVA Brief at 60; *see* Final Rule, 47 Fed. Reg. at 25,949.

[66] PVA Brief at 61-62.

related and more fundamental question has been resolved: What airlines, in fact, *have* section 504 "responsibilities"? The question arises because the CAB, having engaged in the extensive and apparently scrupulous rulemaking procedure only partially summarized in the foregoing paragraphs and notes, decided that the rules it was making could, as a matter of law, be applied only to a small fraction of commercial airlines actually engaged in transporting handicapped travelers.

This interpretation of the extent of its regulatory authority represented a substantial constriction of the CAB's original position as expressed in its 1979 Notice of Proposed Rulemaking.[67] There the Board had interpreted the scope of its rulemaking authority broadly, emphasizing that such regulation of air transportation could be based not only upon section 504 of the Rehabilitation Act but also upon the adequacy of service and antidiscrimination provisions of section 404 of the Federal Aviation Act, 49 U.S.C. § 1374.[68] To the extent to which the Board expressed any doubt as to the reach of its regulatory authority or the wisdom of applying the proposed rules to all carriers, it was hesitant only with regard to the employment practices of airline companies,[69] the imposition of structural requirements for aircraft,[70] and the possibility that regulations reasonably applied to most established airlines and large aircraft might prove too burdensome or impractical for certain small carriers.[71] By the time it issued its Final Rule in 1982, however, the Board was evidently hesitant to apply any specific requirements at all. Although it reaffirmed its reliance upon section 504 and upon section 404 of the Federal Aviation Act as "the requisite authority" for applying Subpart A of the rule—the general antidiscrimination provision—to all carriers,[72] it construed its statutory power to regulate discriminatory practices as extending no further:

> The specific requirements in Subparts B and C of this rule . . . will apply only to those carriers receiving subsidy from the Board under sections 406 or 419 of the Act, in recognition of the limited jurisdictional basis of section 504. Those carriers subject only to the general provisions of Subpart A should look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate.[73]

In promulgating its Final Rule, the Board reasoned that because section 504 prohibits discrimination "under any program or activity receiving Federal financial assistance," [74] it was powerless, in im-

[67] *See supra* notes 9-20 and accompanying text.

[68] Proposed Rule, 44 Fed. Reg. 32, 401-02.

[69] *See supra* notes 14-17 and accompanying text. "The Board did not propose provisions governing employment because it did not consider employment to be covered by Section 504 . . . . A recent decision by the Supreme Court, *North Haven Board of Education v. Bell* [456 U.S. 512 (1982)] . . ., however, caused the Board to reverse this view." Final Rule, 47 Fed. Reg. at 25,947.

[70] *See supra* note 17 and accompanying text.

[71] *See supra* notes 18 and 25 and accompanying text.

[72] Final Rule, 47 Fed. Reg. at 25,937.

[73] *Id.* at 25,937-38.

[74] 29 U.S.C. § 794 (Supp. V 1981).

plementing the statute, to "reach" any program or activity that was *not* receiving such assistance. "In our view," the Board announced, "only subsidy paid under either sections 406 or 419 of the Federal Aviation Act qualifies" as federal financial assistance.[75] In consequence, as petitioners note, the specific provisions of the rules designed to protect handicapped travelers apply only to those carriers receiving subsidies for the transportation of mail,[76] and to several small local and regional air carriers directly subsidized with federal funds for providing essential air-transportation to small communities.[77] As a practical

[75] Final Rule, 47 Fed. Reg. at 25,937.

[76] At the time this petition for review was filed, three carriers were so subsidized: Frontier Airlines, Piedmont Airlines, and Republic Airlines. Under the original section 406 program of the Federal Aviation Act, certain airlines were compensated by the federal government for the transportation of mail. *See* 49 U.S.C. § 1376(c), *as amended* (Supp. V 1981). This program was supplanted by a more limited program in 1982 (shortly after the CAB's Final Rules were promulgated) as part of the congressional plan to "deregulate" air transport and to "sunset" the CAB. *See* PVA Brief at 10; *see also infra* notes 212, 213 and accompanying text.

[77] Under the section 419 program, airlines providing essential air service to a small community received federal subsidies under sections 419(a)(5) or (b)(6) of the Federal Aviation Act. In its Final Rule, the CAB noted that these small local and regional carriers would be required to comply with Subparts B and C of the nondiscrimination rule. In addition to the three carriers noted in note 76, *supra,* the Board identified Ozark, Air Midwest, Skywest, Alaska Airlines, Wien Air Alaska and Kodiak Western as carriers which, by virtue of their receipt of federal subsidies, would be subject to the specific requirements and compliance provisions of the rule. Final Rule, 47 Fed. Reg. at 25,938.

Curiously, the CAB elected *not* to apply Subparts B and C to air carriers receiving compensation retroactively for losses incurred when they have been required to continue providing services which they have requested authority to terminate. Such retroactive compensation, pursuant to section 419(a)(7), was deemed "short term and after-the-fact," making compliance "impractical." *Id.* By contrast, the Department of Justice's Civil Rights Division believed the retroactivity of the compensation did not justify different treatment of such carriers. *See* J.A. at 59; PVA Brief at 11.

matter, it is undisputed that in 1983 the CAB did not require any airline with regularly scheduled flights across the United States or overseas to comply with Subparts B or C of the regulations.[78]

Petitioners argue, in general, that the CAB's interpretation of its rulemaking authority under section 504 is excessively narrow, and that its construction of the scope of the Rehabilitation Act of 1973 is inconsistent with the intent of Congress, the regulations of other agencies, and controlling legal precedent.[79] In particular, in addition to their challenge of two specific provisions of the rules,[80] petitioners urge on several grounds that the agency erred as a matter of law in failing to apply its rules to all commercial airlines, "because these airlines receive federal financial assistance sufficient to bring them within the scope of section 504 of the Rehabilitation Act."[81] It is this last but most fundamental issue which, in our discussion of the considerable com-

[78] Examples of major commercial air carriers that have no legal obligation to comply with Subparts B and C, in the Board's view, are American, Delta, Eastern, Northwest, Pan American, Trans World, and United Airlines.

[79] *See, e.g.,* PVA Brief at 19.

[80] *See supra* notes 64-66 and accompanying text.

[81] PVA Brief at 12.

plexities involved in this petition for review, shall be first.[82]

[82] Jurisdiction in this case is provided by 49 U.S.C. § 1486(a) (1976):

> Any order . . . issued by the Board . . . shall be subject to review by the court . . . upon petition, filed within sixty days after the entry of such order, ... After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Respondents argue that petitioners' filing for review in this case six months after the CAB's promulgation of its Final Rule precludes judicial review entirely. They suggest, moreover, that the Board's amendments to its Final Rule, which were issued on November 18, 1982 after further comment to the Board from the Department of Justice and disabled citizens, 47 Fed. Reg. 51,857, *see infra,* notes 179, 202 and accompanying text, were merely interpretive, so that judicial review remains time-barred.

It is undisputed that petitioners did file for review within sixty days of the Board's promulgation of its Amended Final Rule. More importantly, the CAB explicitly left its rulemaking docket open in order to receive additional comments from the public as well as from the Department of Justice. Final Rule, 47 Fed. Reg. at 25,948. Aware that the rule might be undergoing modification, and unable to predict how extensive any modification would be, petitioners elected to wait until the regulation was in final form before seeking review. Indeed, PVA and other groups representing the handicapped submitted comments to the Board during this period, *see supra* note 64, and it was entirely reasonable of them to expect the agency to "respond in a reasoned manner to the comments received . . . ." Action on Smoking and Health v. CAB, 699 F.2d 1209, 1216 (D.C. Cir. 1983); Rodway v. Department of Agriculture, 514 F.2d 809, 817 (D.C. Cir. 1975) (citations omitted). Any delay simply served properly to exhaust petitioners' administrative remedies, and to conserve the resources of both the litigants and this court. Reasonable grounds having been shown, we grant review in this case pursuant to 49 U.S.C. § 1486(a).

II. Discussion

A. *The Scope of Section 504: Defining "Federal Financial Assistance" in Context*

The Rehabilitation Act of 1973 established "a comprehensive federal program aimed at improving the lot of the handicapped."[83] Section 504 of the Act represented an effort, closely modeled upon civil rights legislation already in force, to offer handicapped individuals an opportunity to pursue employment, educational, and recreational goals free of the additional handicap of discrimination against them.[84] Aware that with section 504 Congress intended "to eradicate the longstanding prejudice against the handicapped,"[85] courts have duly noted the extent to which the language of the section corresponds to that of Title VI of the Civil Rights Act of 1964[86] and Title IX of the Education Amendments of 1972,[87] frequently applying the case law developed

[83] Consolidated Rail Corporation v. Darrone, 104 S.Ct. 1248 (1984).

[84] *See generally* White House Conference on Handicapped Individuals Act, Pub. L. 93-651, § 301, 80 Stat. 2 *et seq.* (1974), 29 U.S.C.A. § 701 (historical note); S. Rep. No. 1297, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6406.

[85] Wegner, *supra* note 4, at 403.

[86] Title VI provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, § 601, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1976); *cf. supra* text accompanying note 3.

[87] Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be de-

in those areas to the resolution of problems arising under the Rehabilitation Act.[88] In our review of the rulemaking proceeding below, and particularly in our analysis of what constitutes sufficient federal "financial assistance" to bring a "program or activity" within the reach of section 504, we shall do the same.

We emphasize at the outset, however, the extent to which the issue of discrimination against the handicapped, particularly in the complex realm of commercial air transportation, is *sui generis*.[89] Ac-

nied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified at 20 U.S.C. § 168(a) (1982)).

[88] *See, e.g.*, Brown v. Sibley, 650 F.2d 760, 767 (5th Cir. 1981); *see also*, Wegner, *supra* note 4.

[89] The difficult choices necessitated by the idiosyncratic nature and extent of any particular individual's disability and the peculiar requirements of air safety make rulemaking in this area especially delicate, as our review of the background of this case in Part I suggests. Even in the arguably less complicated area of ground transportation, it may be no simple task to determine what section 504's deceptively clear mandate requires:

> What must be done to provide handicapped persons with the same right to utilize mass transportation facilities as other persons? Does each bus have to have special capacity? Must each seat on each bus be removable? Must the bus routes be changed to provide stops at all hospitals, therapy centers and nursing homes? Is it required that buses be able to accommodate bedridden persons? Is it discriminatory to answer any of these questions in the negative? Will the operation of hydraulic lifts on buses involve stigmatizing effects on the persons who use them? If so, is that a discrimination solely by reason of handicap within the meaning of § 504?

Atlantis Community, Inc. v. Adams, 453 F. Supp. 825, 831 (D. Colo. 1978). *See also* Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982); American Public Transit Ass'n v. Lewis, 655 F.2d 1272, 1281 (D.C. Cir. 1981) (Edwards, J., concurring).

cordingly, our holding today is a narrow one which must be understood in the unique context of two intersecting considerations. First, we are interpreting a statute that was explicitly addressed not merely to enhancing employment and ending discrimination but to expanding the mobility of handicapped persons, to reducing barriers to transportation. Second, we are concerned with the appropriate regulation of an industry that is an integral part of a "program in activity" of a very special kind. In fact, the analysis of what constitutes "federal financial assistance" in this case, and the related question of how properly to apply section 504 to the airline industry, turn in significant part upon the specific and "special" ways in which, whether directly subsidized or not, all air carriers are inextricably intertwined with the federally-funded "program or activity" of commercial air transportation. Even at its most doctrinal, this is a case, above all, about access to airplanes and the Rehabilitation Act of 1973.

1. *Exclusive Operating Certificates*

In its rulemaking proceeding the CAB properly disposed of the argument made by petitioners and others that all certificated air carriers should be subject to section 504 because they receive federal finan-

cial assistance in the form of "operating certificates giving exclusive domain over valuable air routes." [90]

> While an operating certificate may be of some value, it no longer gives airlines exclusive domain over routes, see section 1601(a)(1)(C) of the Act. It therefore presents a situation similar to *Gottfried v. Federal Communications Commission*, 655 F.2d 297 (D.C. Cir. 1981), where it was held that broadcast licenses do not count as financial assistance within the meaning of section 504.[91]

As appropriate as the Board's reliance upon our holding in *Gottfried* was, however, that case merits a brief discussion here, not only because it represents an important earlier construction of the statute, but also because its holding must be understood in its appropriate—and somewhat limited—context.

In *Gottfried* this court remanded to the FCC a challenge to the license renewal of a public television station on the ground that the Commission had failed to inquire specifically into the station's efforts to meet the programming needs of the hearing impaired.[92] Its obligation to do so, the court noted, was founded upon section 504 of the Rehabilitation Act, to which the public station was bound by virtue of its receipt of federal financial assistance.[93] The court

[90] Final Rule, 47 Fed. Reg. at 25,937.

[91] *Id.*

[92] Gottfried v. Federal Communications Comm'n, 655 F.2d 297 (D.C. Cir. 1981), *rev'd on other grounds, sub nom.* Community Television of S. Cal., 459 U.S. 498 (1983).

[93] The assistance in *Gottfried* was both indirect ("congressional appropriations channelled . . . through . . . the Department of Commerce and the Corporation for Public Broadcasting"), *id.* at 655 F.2d 306, and "more direct and traditional" (restricted program grants to the particular station from particular federal agencies), *id.* at 307.

expressly held, however, that Congress did not "intend broadcast licenses to count as 'financial assistance' within the meaning of section 504." [94] Accordingly, it declined to remand a parallel challenge to the license renewal of seven commercial stations to which, it concluded, section 504 did not apply.[95]

In so doing, this court in *Gottfried* reviewed the "legislative heritage" of section 504 and of the Civil Rights Act of 1964 upon which it was modeled and discovered "no reference to the FCC or to any other government program involving issuance of federal licenses." [96] Moreover, we noted that in its original regulations issued for the guidance of all federal agencies, HEW "never explicitly classified broadcast licenses as financial assistance," [97] even though not only federal "funds" but "services of Federal personnel" and "real and personal property or any interest in or use of such personal property" and other less obviously "financial" assistance was so included.[98] Finally, we observed that the Justice Department, which had recently been designated by Executive Order as the agency responsible for coordinating federal efforts to implement section 504, had specifically held that " '[t]he term "Federal financial assistance" . . . does not include licenses, for example, since li-

[94] *Id.* at 312.

[95] *Id.* at 301, 312.

[96] *Id.* at 312, 313.

[97] *Id.* at 314 n.63.

[98] *Id.* at 314, *citing* 45 C.F.R. §§ 84.3(h), 85.3(e) (1979).

censes are not Federal assistance grants, contracts, loans, or cooperative agreements.' "[99]

In relying upon *Gottfried* to justify its rejection of the argument that operating certificates granted to carriers constitute "federal financial assistance" within the meaning of section 504, therefore, the Board was correct.[100] The license-specific nature of *Gottfried*'s holding and rationale, however, limits its applicability when considering other types of federal financial assistance.[101]

2. *Favorable Tax Treatment*

Petitioners note that "[f]rom its inception, the commercial aviation industry has received substantial direct and indirect assistance from the federal government," and that "[m]ost of the major airlines" received direct subsidies "in their early years." [102]

[99] *Id.* at 314 n.65 (quoting Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementing Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37,620, 37,632 (June 3, 1980)).

[100] This is not to say that broadcast or other federal licenses cannot be of great value. It has been suggested that even twenty years ago television broadcast licenses were worth $1,500,000, *see* Levin, *Economic Effects of Broadcast Licensing*, 72 J. POL. ECON. 151 (1964), and it has been argued that granting such a license is the functional equivalent of "Government subsidization of broadcasters," Columbia Broadcasting Syst., Inc. v. Democratic Nat'l Committee, 412 U.S. 94, 174 n.5 (1973) (Brennan, J., dissenting). Our holding in *Gottfried* was made in the face of such suggestions and arguments, which are less weighty here, since airline operating certificates are no longer exclusive.

[101] *See, e.g., infra* notes 144-147 and accompanying text (discussion of Angel v. Pan Am. World Airways, Inc.).

[102] PVA Brief at 13.

Currently, they argue, such federal financial assistance takes the form not only of money subsidies under certain sections of the Federal Aviation Act but also of special investment tax credits made available to "certain railroads and airlines" by the Internal Revenue Code, 26 U.S.C. § 46(a)(8) (1976 & Supp. V 1980). Respondents, by contrast, find it "inconceivable" that Congress "intended to place nondiscrimination obligations on every commercial enterprise enjoying some form of favorable tax treatment." [103]

Petitioners find support for their position in *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court), which held "that assistance provided through the tax system is within the scope of Title VI of the 1964 Civil Rights Act," since

> [i]n the absence of strong legislative history to the contrary, the plain purpose of the statute is controlling. Here that purpose is clearly to eliminate discrimination in programs or activities benefitting from federal financial assistance. Distinctions as to the method of distribution of federal funds or their equivalent seem beside the point....[104]

The three-judge court in *McGlotten* ruled that the tax exemption provided fraternal orders by section 501 (c)(8) of the Internal Revenue Code, "[s]ince it is available only to particular groups . . . operates in fact as a subsidy in favor of the particular activities these groups are pursuing. It thus falls within the

[103] Respondents' Brief at 29.

[104] McGlotten v. Connally, 338 F. Supp. 448, 461 (D.D.C. 1972) (three-judge court).

coverage of the Civil Rights Act." [105] By direct and legitimate analogy, petitioners suggest, the investment tax credit available to railroads and airlines *in particular* by section 46(a)(8) constitutes sufficient federal financial assistance to airlines so "subsidized" [106] to trigger coverage by section 504.

In its rulemaking proceeding the CAB failed to address the tax subsidy argument. To this court, respondents argue that *McGlotten* is petitioners' "sole authority," that it "has had no case law progeny," that its discussion of Title VI and "federal financial assistance" was merely "dictum" in a case that was really about the state action doctrine and the equal protection clause, and that in its recent decisions holding that tax exemptions and tax deductibility do indeed constitute "a form of subsidy that is administered through the tax system," *Regan v. Taxation with Representation of Washington*, 461 U.S. 540,

[105] *Id.* at 462. *McGlotten* noted also that the deductibility of charitable contributions to § 501(c)(8) fraternal orders "operates in effect as a Government matching grant," *id.* (citations omitted) and therefore, like the exemption available to such groups, constitutes a "grant of federal financial assistance." *Id.* The court concluded that the fraternal organizations in *McGlotten*, which excluded nonwhites from membership, were subject to Title VI.

[106] *McGlotten* observed that "the deductions provided in the Code are not all cut from the same cloth. Most relate primarily to the operation of the tax itself, and thus would not constitute a grant of federal financial assistance." *Id.* at 461. In this case, however, the Code provision is highly specific, relating not to the "tax itself" but to "airline property . . . used by the taxpayer directly in connection with . . . the furnishing or sale of transportation as a common carrier by air subject to the jurisdiction of the Civil Aeronautics Board or the Federal Aviation Administration." 26 U.S.C. § 46(a)(8)(E) (1976 & Supp. V 1980).

544 (1983), the Supreme Court "conspicuously failed to invoke" *McGlotten.*[107] None of these arguments is convincing. Both in *Regan* and *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court affirmed *McGlotten*'s fundamental approach. More important, we think, is the possibility that Congress did not intend, by granting a limited tax incentive to a particular industry or group, to thereby encompass every such industry or group, or, for that matter, individual within some ever-widening and potentially almost limitless definition of "federal financial assistance."

It is true that the industry-specific nature of the accelerated depreciation allowance permitted airline property may obviate that danger in this case. But it is also true that the exemptions and deductions at issue in *McGlotten*, *Bob Jones*, and *Regan* were of a much more fundamental nature than the modest incentive to capital expenditures to which petitioners point here.[108] To find that the government could force an airline to comply with a federal antidiscrimination mandate solely because it takes advantage of section

[107] Respondents' Brief at 29 n.17. Respondents fail to note that a crucial companion case tc *Regan* prominently credits *McGlotten* with prompting Congress to enact a Code provision denying tax subsidies to segregated social clubs. Bob Jones Univ. v. United States, 461 U.S. 574, —— n.26 (1983) ("Section 501(i) was enacted primarily in response to that decision.").

[108] We note, for example, that the discussion of charitable exemptions and deductions in *Bob Jones* emphasizes their historic importance and fundamental nature, and that neither *Regan* nor *Bob Jones* discusses any (of the multitude of) Code provisions other than plenary exemptions and deductibility of the sort applied exclusively to non-profit organizations.

46(a)(8) tax credits would be to find the government impotent to compel such compliance if any airline should elect to forego such credits. If Congress did intend handicapped citizens to have access to air transportation and to apply the nondiscrimination principles of section 504 to all carriers, we would violate that intent by holding that a carrier could avoid compliance through its accountant, or that Congress would be giving a green light to discrimination if it ever chose to enhance federal revenues in this deficit-plagued era by closing tax loopholes or simplifying the Code.

3. *The National Air Traffic Control System*

If interpreting every *de minimis* tax incentive as sufficient "federal financial assistance" to trigger the coverage of federal antidiscrimination statutes would be overbroad in its consequences and reach, petitioners' argument that the government's expenditure of some two billion dollars annually to provide airlines with a national system of air traffic control seems, by contrast, appropriately narrow and specific.[109] This program employs, on a twenty-four hour basis, highly-trained air traffic management personnel who monitor and control takeoffs, landings, and en route flights of civil and military aircraft in order to assure safe and expeditious air transportation. By directly financing the operation of twenty-five control centers, more than four hundred terminal control

[109] In 1983 and 1984 the federal government allocated $2.2 billion and $2.3 billion, respectively, for the operation, installation and maintenance of the air traffic control system. Executive Office of the President, Office of Management and Budget, Appendix to the Budget of the United States Government, 1984 at I-Q27.

facilities, and additional flight service stations, as well as by administering its flight standards and medical fitness programs, petitioners argue, the federal government provides financial assistance that is "absolutely critical to the operation of the airlines." [110]

It cannot be seriously disputed that the safe and efficient operation of commercial air transportation depends in great measure (if not, as petitioners assert, "entirely") upon "the proper functioning of the national air traffic control system." [111] One can scarcely imagine a modern airline representing to its customers that a regularly scheduled flight will leave at a time certain and arrive reliably at its destination if this "essential service" [112] provided by the FAA did not exist. Moreover, this crucial assistance may reasonably be considered "financial." Definitions of "federal financial assistance" issued by both the Department of Health and Human Services and the Department of Justice state explicitly that the term encompasses

> any grant, loan, contract, . . . or any other arrangement by which the agency provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property . . . .[113]

[110] *See* PVA Brief at 14.

[111] *Id.* at 18.

[112] United States v. Professional Air Traffic Controllers Org., 653 F.2d 1134, 1141 (7th Cir. 1981), *cert. denied,* 454 U.S. 1083 (1981).

[113] 28 C.F.R. § 41.3(e) (1983) (Department of Justice). Most federal agencies construe "federal financial assistance"

Consequently, petitioners' argument that the federal air traffic control system is an "arrangement" that "provides or otherwise makes available assistance in the form of . . . services of Federal personnel" leads reasonably to the conclusion that the system does indeed constitute federal financial assistance to all commercial air carriers. It follows, therefore, that any and all carriers making use of the federal air traffic control system should be subject to any regulations promulgated under section 504.

Respondents attack this argument on several grounds. First, they contend that "regulatory history and common sense" makes it clear that the current "services of Federal personnel" language really means "the loan or detail of Federal personnel to carry out functions which private (*i.e.*, airline) employees would otherwise have to perform, *e.g.*, fly airplanes." [114] We are not persuaded, however, that the language of the Justice Department's implementing regulations should be taken to signify anything less than the plain meaning of the words themselves. "As a general matter, courts eschew narrow interpretations of remedial statutes. Instead, remedial statutes are normally accorded broad construction in order to effectuate their purpose." [115] As

at least as broadly. *See, e.g.*, 10 C.F.R. Part 1040.3(o) (1984) (Department of Energy); 22 C.F.R. § 142.3(h) (1983) (Department of State); 29 C.F.R. § 32.3 (1983) (Department of Education); 38 C.F.R. § 18.403(h) (1983) (Veterans Administration).

[114] Respondents' Brief at 25.

[115] Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1380 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 1591 (1984); *accord*, Peyton v. Rowe, 391 U.S. 54, 65 (1968); Ayers v. Wolfinberger, 491 F.2d 8, 16 (5th Cir. 1974).

the Senate report on the 1974 amendments to the Rehabilitation Act explained, "section 504 was enacted to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, *transportation*, education, health services, or any other Federally-aided programs." [116] To that end, section 504 and the civil rights statutes with which it shares a common language and heritage must "be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible." [117]

Respondents' more substantial line of attack reiterates a point first articulated by the Board in justifying its Final Rule below: "It is the position of the FAA, with which we concur, that its air traffic control services are not financial assistance to airlines. Rather, they are services provided to the public generally to ensure flight safety." [118] The federal air traffic control and safety programs, respondents suggest to this court, must be considered

> in the general category of "public goods." They are the goods and services from which all citi-

[116] S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388 (emphasis added); *see also* S. Rep. No. 1149, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7404.

[117] United States v. El Camino Community College Dist., 454 F. Supp. 825, 829 (C.D. Calif. 1978), *aff'd*, 600 F.2d 1278 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980), *citing* Sutherland, Statutes and Statutory Construction § 72.05 at 392 (4th ed. 1974) ("To this end, courts favor broad and inclusive application of statutory language by which coverage of legislation to protect and implement civil rights is defined."); *see also* Griffin v. Breckenridge, 403 U.S. 88 1971).

[118] Final Rule, 47 Fed. Reg. at 25,937.

zens and businesses benefit . . . . Thus, for example, the government may assure clean air through a variety of means, Federally financed or operated. But the recipient of the benefit cannot be precisely located, and no one enjoys an exclusive benefit. The air controllers help to assure "safe skies"; this "assists" airlines more directly than it assists other enterprises; yet it also assists all enterprises that use the airlines or fly private planes in the course of their business. It also protects those on the ground from plane crashes. It does not, however, amount to "Federal financial assistance."

If, as PVA seems to assume, Congress had wanted to cover every enterprise benefitting from a federal program, it would have said so, but it did not.[119]

It is true that in important respects the provision of air traffic controllers might be analogized to the provision of highway patrolmen or traffic signs or signal; federal funding of such programs would not be likely to be considered the sort of "Federal financial assistance" sufficient to bring every private trucking business or other enterprise that used the highways within the scope of section 504. On the other hand, respondents concede that the air controller program "assists" airlines more directly and extensively and specifically than other enterprises. Moreover, as petitioners observe, it would be absurd to exempt a federally-funded local transit authority or school system from compliance with section 504 on the ground that public transportation benefits passengers as well as transit systems and, like public

[119] Respondents' Brief at 27, 28 (citations omitted).

education and safe air travel, it is a "public good." [120] The fact is that the air traffic control system is *indispensable* to the *very existence* of modern commercial aviation, and that if it were not provided by the federal program now in place, it would have to be provided, and paid for, by the airlines themselves.[121]

It is at this juncture, however, that our analysis must be informed by the Supreme Court's resolution of a related problem in a case that has been decided since we heard oral argument in this matter. In *Grove City College v. Bell*, 104 S.Ct. 1211 (1984), the Court construed the language of Title IX's prohibition against sex discrimination in any "education program or activity" that is "receiving Federal financial assistance" in a manner that compels us to focus less on the mode of assistance than on the "program or activity" being assisted. In particular, although the Court warned that nothing in Title IX justified "making the application of the nondiscrimination principle dependent on the manner in which a pro-

[120] *See* PVA Reply Brief at 8-11.

[121] *See id.* Indeed, some recent proposals to substitute a privately owned and operated system of air traffic control would lead, presumably, to just such a result—that is, airlines would contract with and pay for the services of the private program operator(s). The "assistance" provided the airlines in the form of the FAA's flight standards program, however—certifying aircraft, pilot competence, etc.—is more purely regulatory in nature, and therefore more analogous to the *Gottfried* analysis, *see supra* at notes 90-101 and accompanying text. To require a private company to acquire a license or adhere to a federal standard, and then to call the costs of regulation and of monitoring compliance a "benefit" to the regulated company which amounts to "financial assistance," would constitute bootstrapping and would exceed the boundaries of liberal statutory construction in the interests even of remedial action and civil rights.

gram or activity receives federal assistance,"[122] it emphasized as well that an agency's authority to regulate under Title IX was limited by "the program specific nature of the statute."[123] Thus, even if the "economic ripple effects" of federal financial aid to a college's students resulted in additional funds for the institution's general operating budget, a plurality of the Court held, per Justice White, that only "the College's own financial aid program . . . may properly be regulated under Title IX."[124]

The implications of the *Grove City* analysis for the case before us are not completely clear. To the extent to which petitioners argue that a national air traffic control system would have to be provided at the airlines' own expense if it were not provided by the federal government (*i.e.*, that this federal program has "economic ripple effects" that make additional funds available for other airline operations), the *Grove City* plurality would appear to be unsympathetic. And if the federal air traffic control system is the "program or activity" which is deemed to receive "federal financial assistance," then the program-specific mandate of *Grove City* would imply

[122] Grove City College v. Bell, 104 S. Ct. 1211, 1217 (1984).

[123] *Id.* at 1221.

[124] *Id.* at 1221, 22. Otherwise, the plurality reasoned, "an entire school would be subject to Title IX merely because one of its students received a small BEOG [Basic Educational Opportunity Grant] or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent . . . [W]e have found no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity." *Id.*

that only that particular system—its personnel practices and physical facilities, for example—could be regulated under section 504. If, on the other hand, the "program or activity" at issue is deemed to be that of commercial air transportation as engaged in by the air carriers, and if the air traffic system is deemed—via its personnel and facilities—to *be* the "federal financial assistance" provided to that program, then any "program specificity" problem with petitioners' argument is avoided.

Such a problem is not before us in the instant case, however, because we need not reach it to hold that the CAB erred as a matter of law in failing to apply its section 504 regulations to all commercial air carriers. We base this holding upon the federal government's funding of airports and "airways," upon the necessary and inextricable integration of these facilities with all commercial air carriers and, above all, upon the clear intent of Congress in passing the Rehabilitation Act of 1973 and the effort of appropriate agencies to effectuate the mandate of section 504 in the unique context of commercial air transportation.

4. *Federally Assisted Airports*

The Airport and Airway Development Act of 1970, 49 U.S.C. § 1714, *as amended*, authorized the Secretary of Transportation "to make grants for airport development" in order "to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics . . . ."[125] To this end Congress established the Airport and Airway Trust Fund, monies from which are used to construct, acquire, lease

[125] 49 U.S.C. § 1714(a), *as amended* (1976 & Supp. V 1981).

and improve facilities and equipment used in civil aviation, currently in the amount of several billion dollars annually.[126] Grants received by airports are not "earmarked" but are "obtained through the use of a single project application to cover all airport improvement projects contained in the airport's annual expenditure program." [127] Typical capital projects undertaken with the substantial federal financial assistance so obtained have been airport land acquisition, runway construction, passenger terminals, airport lighting, airport access and service roads, electronic and visual approach aids, taxiway construction, obstruction removal, and fire/rescue equipment and buildings.[128] It is undisputed that this extensive federal financial assistance to airports subjects them to the nondiscrimination mandate of the federal civil rights laws, including section 504 of the Rehabilitation Act of 1973.[129]

The critical question then becomes whether, as respondents contend, the scope of section 504 "extends to the threshold of the planes themselves, but not

[126] 49 U.S.C. § 1742, *as amended* (1976 & Supp. V 1981).

[127] Between 1982 and 1984 an estimated $17 billion were available for apportionment by the Secretary. Estimates of actual disbursements, consistent with a statutory formula now based, *inter alia,* upon the number of passengers emplaned at a particular airport, were about one third that amount. *See* PVA Brief at 17 n.14; 49 U.S.C.A. § 2206(a)(1) (West Supp. 1984) (codifying the Airport and Airway Improvement Act of 1982, Pub. L. 97-248, 96 Stat. 671, Sept. 3, 1982).

[128] National Transportation Policy Study Commission Final Report, *National Transportation Policies Through the Year 2000* (June 1979) at 187-88.

[129] *See, e.g.,* Respondents' Brief at 29, 30 (citing the Title VI regulations of DOT and FAA and DOT's section 504 regulation).

beyond." [130] Such a result is required, respondents argue, by virtue of "longstanding administrative interpretation," Supreme Court precedent, and a case in our own district court which "has squarely held" that the indirect assistance provided airlines using federally-funded airports did not trigger the coverage of section 504.[131] We consider, and reject, each of these arguments in turn.

First, the longstanding and, until this proceeding, consistent interpretation of federal civil rights statutes has supported the position not of respondents but of PVA. For example, in applying its Title VI regulations to federally assisted airports, the Department of Transportation explicitly included

> restaurants, snack bars, gift shops, ticket counters, baggage handlers, car rental agencies, limousines and taxis franchised by the airport sponsor, insurance underwriters, and other businesses catering to the public at the airport.[132]

If these businesses are construed as receiving federal financial assistance by virtue of federal aid to airports, it is nonsensical to exclude the air carriers themselves, which surely are businesses "catering to the public at the airport." Indeed, in its own section 504 rulemaking, DOT explained that its regulations apply, *inter alia,* to ticket counters, boarding devices, baggage check-in and retrieval, and teletypewriters, "all of which are owned and operated by the

[130] *Id.* at 30.

[131] *Id.* at 30-31.

[132] 49 C.F.R. Part 21, Appendix C (1984).

airlines at most airports."[133] DOT's decision in 1979 *not* to extend its own rules to air carriers' in-flight activities obviously was a result of the CAB's assertion of such authority at that time, and of DOT's commendable effort to avoid redundant, overlapping regulations:

> Following publication of [DOT's] NPRM, representatives of the DOT, FAA, HEW and the Civil Aeronautics Board (CAB) met to discuss the respective legal authority and responsibilities for improving the accessibility of air travel to handicapped persons. Following this meeting, the CAB determined that it had statutory authority to issue regulations governing air transportation of handicapped persons . . . . *Action by the CAB . . . would ensure the uniform provision of services and equipment by the airlines, needed to accomplish accessibility to air travel for handicapped persons . . . .*[134]

Of course, the CAB's initial interpretation of its rulemaking authority under section 504 was consistent with this expectation. Its Notice of Proposed Rulemaking assumed that all certificated carriers would be covered, and invited comment specifically *only* as to whether small commuter carriers with planes of fewer than thirty seats should be exempted.[135] This initial position of the CAB was in

[133] Nondiscrimination on the Basis of Handicap in Federally-Assisted Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 44 Fed. Reg. 31,442, 31,451 (May 31, 1979) [hereinafter cited as DOT Section 504 Rules].

[134] *Id.* at 31,451 (emphasis added).

[135] *See supra* note 35; Proposed Rule, 44 Fed. Reg. at 32,405. Commenting in this regard on the CAB's proposed section

fact consistent with its own "longstanding administrative interpretation" of its Title VI regulations as covering programs "including"—but not limited to—those receiving direct money subsidies, and as applying not only to "money paid" but to "other federal financial assistance extended."[136] The Board's sudden reversal in this regard was contrary not only to the interpretation of other agencies in this context, but to its own.

A more substantial argument advanced by respondents is based upon two recent Supreme Court cases, one of which was *sub judice* at the time the instant petition for review was heard. In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), the Court concluded "that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902."[137] Thus, respondents argue, "[w]hile an airline may utilize a federally-funded program, *i.e.*, airport operations, it is not a federally funded program itself by virtue of the airport's receipt of aid."[138] *North Haven's* emphasis upon "program specificity" was, as we have

504 rules, DOT urged the more inclusive coverage: "We do not believe application of Part 382 should be limited . . . . DOT believes that handicapped travelers should not be deprived of air transportation [on planes of less than 30 seats], unless a carrier can show that, because of aircraft structure restrictions, certain types of handicapped passengers cannot be safely accommodated." Comments of the U.S. Department of Transportation before the Civil Aeronautics Board at 4, 5 (Sept. 13, 1979), J.A. 78, 79.

[136] 14 C.F.R. § 379.2 (1983).

[137] 456 U.S. at 538.

[138] Respondents' Brief at 32.

noted, reaffirmed by the Court's more recent decision in *Grove City College v. Bell*.[139] But it is also true that in its *North Haven* opinion the Court expressly did "not undertake to define 'program' " [140] and that in *Grove City* the plurality emphasized not only that the student financial aid at issue was "*sui generis*" but that the intent of Congress in passing Title IX was central to its analysis.[141] In considering what we believe must also be termed the *sui generis* nature of commercial air transportation, as well as the intent of Congress in passing the Rehabilitation Act of 1973, combined with the postenactment administrative and legislative construction of section 504, we find that the regulations promulgated in this case must be applied to all air carriers using federally-funded airports in their "program or activity" of providing commercial air transportation.

Airports and airlines are inextricably intertwined.[142] The indissoluble nexus between them is the

[139] 104 S.Ct. 1211 (1984).

[140] 456 U.S. at 540.

[141] 104 S.Ct. at 1221, 23.

[142] For example, as the Board itself has observed, at some airports "a single airline may have its own terminal building" and substantial parts of the airport's physical plant may be "carrier-owned." In other cases "the design of most of the facilities, perhaps even including parking facilities, may well be under the airlines' control [including control "over their selection, design, construction or alteration"], even if the property is leased from an airline authority." Final Rule, 47 Fed. Reg. at 25,940. Especially in the case of the larger, most widely used airports and air carriers, the structural, and *a fortiori* the functional, integration of airport and air carrier is self-evident. As has been noted, "in the airline industry, two inputs (airline services and airport services) are required to produce a single output (air transportation)." Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319 n.1 (1983). See also the Board's initial definition of "facility" in its Proposed Rule, *supra* note 27.

provision of commercial air transportation. Although airports may lease space to gift shops and airlines may publish in-flight magazines or own a chain of resort hotels, when it comes to the "program or activity" of providing air transportation to the traveling public, the two entities are so functionally integrated that they become one. While it *may* be the case, as respondents urge, that the *airline* as a corporate entity does not become a federally-assisted "program" by virtue of its use of federally-assisted airports, its "program or activity" of providing commercial air transportation certainly does. Thus, section 504 may or may not reach the practices of a hotel owned and operated by an airline company; but it certainly must reach, in our view, the treatment afforded a passenger who boards that company's aircraft at, deplanes to, and reaches his destination safely and efficiently only because of, a federally-funded airport. Just as the plurality in *Grove City* distinguished the college's financial aid program from other programs within the institution, an airline's commercial aviation program, its activity in actually carrying passengers from one place to another, may be distinguished from its other programs or activities.

Respondents attempt to avoid this holding, finally, by pointing to a case in our district court which "squarely held" [143] that to "hold that commercial airlines fall within section 504 merely because of assistance provided to airports would expand improperly the accepted proposition that section 504 is limited to

[143] Respondents' Brief at 30.

direct recipients of Federal funds."[144] The Board quoted in full and explicitly relied upon this language from *Angel v. Pan American World Airways, Inc.*[145] We reject it on at least three grounds, and declare *Angel* squarely overruled.

First, even if "airlines" on a company-wide basis are not covered by section 504, we believe their programs and activities providing commercial air transportation are, as noted above. Second, *Grove City* directly undermines any notion that coverage of federal antidiscrimination statutes is in any way—much less as an "accepted proposition"—"limited to direct recipients of Federal funds." As the Court held unambiguously in *Grove City*:

> Nothing . . . suggests that Congress elevated form over substance by making the application of the non-discrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation.[146]

Third, *Angel* depends for its holding upon an unjustifiably broad reading of *Gottfried v. FCC*, a case which, as we have discussed in some detail, is license-specific in its holding and rationale, and which in the consideration of federal financial assistance to airports and air transportation is thoroughly inapposite.[147]

[144] Angel v. Pan Am. World Airways, Inc., 519 F. Supp. 1173, 1178 (D.D.C. 1981).

[145] Final Rule, 47 Fed. Reg. at 25,937.

[146] 104 S.Ct. at 1217.

5. *Additional Considerations: The Special Administrative and Legislative Context*

Our holding today that section 504 of the Rehabilitation Act of 1973 applies to all commercial air carriers and that the CAB erred in restricting the application of its section 504 regulations to those few small carriers receiving direct money subsidies is buttressed by several unique features of this case. These include the particular concern evidenced by Congress for the right of handicapped persons to travel and to have the greatest possible access to employment opportunities, the regulatory inconsistencies manifested by the Board in the proceedings

[147] *See supra* notes 90-101 and accompanying text. Similarly, respondents' reliance upon Disabled in Action v. Mayor and City Council of Baltimore, 685 F.2d 881 (4th Cir. 1982), must fail, not for one but for at least three reasons. First, in holding that the Baltimore [Orioles] Baseball Club, as a non-exclusive lessee of a federally-assisted municipal stadium, was not subject to section 504 obligations, the *Disabled* court pointed repeatedly to *Angel*, which we have criticized, and to the 'indirect" nature of the aid involved, which cannot be weighted so heavily after *Grove City*. Second, the court's analysis in *Disabled* centered upon problems of enforcement and compliance, implicating issues not only of "directness" but of "affirmative action" not present in the instant case (Club legally powerless to make "extensive physical alterations demanded by plaintiffs," *id.* at 685). Third, in no sense was access to baseball games as central a concern of Congress in enacting the Rehabilitation Act of 1973 as was nondiscriminatory access to vital modes of transportation and, thereby, to employment opportunities that might otherwise be denied solely on account of handicap. *See infra* notes 148-156 and accompanying text.

below, and the recent reaffirmation by Congress of its commitment in this area through its passage of the Civil Aeronautics Board Sunset Act of 1984.

Our starting point in this case must be not only the statutory language,[148] which in the case of section 504 must be accorded "the scope that its origins dictate, . . . a sweep as broad as its language," [149] but the statute as a whole. So concerned was the Rehabilitation Act of 1973 *with transportation in particular* that it "established within the Federal Government the Architectural and Transportation Barriers Compliance Board" composed of, among others appointed by the President, the heads of the Departments of Health, Education, and Welfare, Transportation, Housing and Urban Development, Labor, Interior, Defense, and of the General Services Administration, Postal Service, and Veterans Administration. This Board [hereinafter ATBCB] was charged particularly with the task of reducing "architectural, transportation, and attitudinal barriers" in, *inter alia*, "public transportation (including air, water, and surface transportation whether interstate, foreign, intrastate or local)." [150] Consequently, it was not surprising that a 1974 Senate report should list transportation as one of five itemized areas to which section 504 was meant to apply.[151]

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[148] *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520 (1982); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978).

[149] 456 U.S. at 421, *citing* United States v. Price, 389 U.S. 787, 801 (1966).

[150] 29 U.S.C. § 792(a), (b)(2) (Supp. V 1981).

[151] *See supra* note 116 and accompanying text.

Congress was well aware in passing the 1973 Act, so much of which was aimed at vocational rehabilitation, that "even [if] the maximum employment opportunities for the handicapped [were] fully created, they could not be filled without the ability of handicapped individuals to get to their jobs." [152] Obviously, today more than ever, air transportation is a necessary element in securing and performing many jobs.[153] So even if transportation *per se* had not been singled out by Congress in section 502 of the 1973 Act, and even if the Act's administrative creation, the ATBCB, had not testified in favor of giving the broadest possible reading to section 504 in the proceedings below,[154] any fair reading of the Act reveals

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[152] S. REP. NO. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2122.

[153] As explained by the comments of the United Cerebral Palsy Associations during the CAB's rulemaking proceedings below:

> [t]he American people are dependent on air travel for vital opportunities [since] many people must travel by air in order to perform their jobs. Clearly, access to air travel is not a luxury[;] it is vital to anyone wishing to participate in the mainstream of society.

J.A. at 166.

[154] The ATBCB not only supported PVA's position on the meaning of "federal financial assistance" and the proper scope of section 504, *see* Final Rule, 47 Fed. Reg. at 25,937, but vigorously criticized the CAB's initial decision to deliberately avoid any requirement of structural changes in aircraft. *See supra* note 17 and accompanying text. That decision, the ATBCB argued,

> seriously weakens the effect of the services requirements. A disabled person's theoretical right to air travel is meaningless if he or she cannot board the plane, go from the entry to his or her seat conveniently and with dignity,

that maximizing employment opportunities—and therefore minimizing barriers to transportation—for the disabled goes to its very heart.[155] As the com-

travel about the cabin, and use the lavatory. From our inquiries it is apparent that technology for equipment and alterations to facilitate such access and use does exist, especially in the industrial design divisions of the airlines. We urge the CAB to act quickly to promulgate requirements both for inexpensive retrofitting and for structural design of new aircraft.

Comments of United States Architectural and Transportation Barriers Compliance Board before the Civil Aeronautics Board, Sept. 5, 1979, J.A. at 146, 148.

[155] This is not to say that section 504 requires profound or extremely costly "affirmative action" in the form, for example, of extensive structural modification of aircraft. *See supra* note 154, and note 17 and accompanying text. In the context of educational programs the Supreme Court has noted that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds," Southeastern Community College v. Davis, 442 U.S. 397, 411, so that "substantial modifications" in programs of a nursing school were not required in order to accommodate a deaf applicant for admission. *Id.* Relying upon *Davis,* this court has held that regulations that "require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities" are not valid under § 504. American Public Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981). But we recognized in *Lewis,* as the Supreme Court had in *Davis,* that "the line between impermissible discrimination and optional affirmative action is a fine one," 655 F.2d at 1277, and that a "refusal to take modest, affirmative steps to accommodate handicapped persons might well violate the statute." *Id.* at 1278. In the instant case we are presented with just such modest steps,with an agency so finely attuned to expense that it explicitly eschewed any request for structural modifications, *see supra* note 154, and with an agency so acutely aware of the need for case-by-case decisionmaking that it deferred to the air carrier's discretion and the need for flexibility at every turn. *See supra* notes 59-66 and accompanying text. In *Lewis,* by contrast, the rules in question were acknowledged by the agency itself, in so many words, to be "'extraordinarily expensive,'" (requiring "extensive" modifications of existing systems, including, *inter alia,* accessibility to wheelchairs of *every* new bus or subway car "regardless of cost," and elevators and other additions to existing subway stations). 655 F.2d at 1278. The case before us is not *Lewis.* In any event, both *Lewis* and *Davis* go to the substantive nature of the regulations and "the kind of burdensome modifications" they may require, *id.,* not to the jurisdictional scope of agency rulemaking under § 504.

ments of the Act's "own" agency put it to the CAB: "Accessible transportation is often the key to a disabled person's employment, education, recreation, and access to social services. Without the right of access to transportation, all other civil rights are meaningless." [156]

We find additional support for our holding today in what might best be termed the need for regulatory consistency and rationality. The CAB's discussion of its section 504 authority, and particularly of its rather sudden reversal of position between 1979 and 1982, was inadequate, vague and contradictory. Not only was its reliance on *Angel* (and that case's misreading of *Gottfried*) misplaced,[157] but even on its own terms the Board's analysis was turgid. Claiming to reject the "restrictive reading of our jurisdiction put forth by the airlines," the Board insisted that it was "adopting an approach . . . that represents a compromise between applying the rule to all

[156] Comments of the Architectural and Transportation Barriers Safety Board, Sept. 5, 1979, J.A. at 146, 147.

[157] *See supra* notes 90-101, 144-147 and accompanying text.

carriers and having no rule at all."[158] The form this "compromise" took, of course, was to apply only the general antidiscrimination provisions (Subpart A) to all airlines,[159] while applying the specific, substantive provisions (Subparts B and C) to subsidized carriers only,[160] claiming without any citation to authority that "[t]hose carriers subject only to the general provisions of Subpart A should look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate."[161]

Respondents are unclear, as the Board was, about the source of the CAB's conclusion that non-subsidized carriers "should look to" Subpart B. They point to the duty of every air carrier to provide "adequate service" under section 404(a) of the Federal Aviation Act[162] as supplying the "requisite authority to apply general provisions" to non-subsidized carriers.[163] But they do not—and, we believe, cannot—explain why section 404(a), if it authorizes the application of Subpart A, will not extend to Subparts B and C, which give the general provisions substance and teeth. They do not—and, we believe, cannot—explain what "look to" means, or why it is that, as respondents contend in their brief, "non-subsidized certificated carriers could not ignore the specific requirements applicable to the subsidized carriers."[164]

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[158] Final Rule, 47 Fed. Reg. at 25,937.

[159] *See supra* notes 21-29 and accompanying text.

[160] *See supra* notes 30-45, 68-78 and accompanying text.

[161] Final Rule, 47 Fed. Reg. at 25,937-38.

[162] Respondents' Brief at 4; 49 U.S.C. § 1374(a) (1976).

[163] 47 Fed. Reg. at 25,937.

[164] Respondents' Brief at 11.

In fact, they could do precisely that if the CAB's view of the scope of section 504 in this case were affirmed by this court.[165]

In the proceeding below, the CAB rightly rejected the airlines' assertion that its proposed rules "merely duplicate existing FAA regulations."[166] It correctly characterized the primary purpose of the FAA rules as ensuring passenger safety, reasonably deferred to the FAA's in-flight safety expertise where it was appropriate to do so,[167] and noted that its own aim was "not merely to ensure that the disabled are carried safely, but to ensure that they face no unreasonable, nonsafety-related obstacles to travel. To that end, this rule covers issues . . . that are not reached by the FAA rules."[168] The Board's admirable sensitivity to the work of other agencies and the need for consistency in removing unreasonable obstacles to travel, however, did not extend far enough. It was aware that regulations of the Department of Transportation

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[165] Even if the specific requirements of Subpart B were considered important interpretive guidelines by courts construing Subpart A's application to all carriers, they would not be agency rules binding airlines with the force of law. Private suits seeking enforcement of the Subpart B requirements, in actions for both injunctive and monetary relief, might not be available to the vast majority of handicapped persons who must travel by air. *See* Cannon v. University of Chicago, 441 U.S. 677 (1978); *see also* Consolidated Rail Corp. v. Darrone, 104 S.Ct. 1248 (1984). The Subpart C regulations authorizing cease and desist orders and the assessment of civil penalties for noncompliance would not, of course, be in force.

[166] Final Rule, 47 Fed. Reg. at 25,938.

[167] *See supra* notes 61-63 and accompanying text.

[168] Final Rule, 47 Fed. Reg. at 25,938.

already required all certificated carriers to comply with section 504's mandate in the operation of, *inter alia*, ticket counters, boarding devices, and baggage check-in and retrieval.[169] It was aware, indeed, that DOT had relied upon the CAB's earlier assertion of section 504 authority and was now urging the Board to exercise it.[170] Nevertheless, the CAB refused to recognize the full measure of its own authority, leading to the absurd result that handicapped persons are protected from discrimination in air transportation only up to the door of the aircraft—that is, so long as they are not being transported in the air. Our holding today obviates any such nonsensical outcome and vindicates the clear congressional purpose.[171]

In addition, restoring the scope of section 504 rule-making authority to the dimensions originally contemplated by the CAB will vindicate that agency's hard and conscientious work in fashioning substantive requirements through these proceedings. The nondiscrimination rules will now actually apply to a meaningful number of handicapped travelers. The specific regulations fashioned with great sensitivity in order to minimize expense and regulatory burden will no longer fall—not only most heavily but *ex-*

[169] *See supra* note 133 and accompanying text.

[170] *See supra* notes 134-35 and accompanying text. In commenting upon the CAB's rules, the DOT urged the Board to ensure that "the regulations of both agencies [would] be compatible." J.A. at 76.

[171] In addition to its specific transportation-related goals, in 1974 Congress made plain its objective that section 504 "be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result." S. REP. No. 1297, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 6391.

clusively—upon those small (subsidized) airlines least able to carry the load. And certain otherwise anomalous aspects of the rules, which appear to have been drafted sometimes with all carriers in mind, sometimes with only the small, subsidized carriers in mind, can now be rendered more uniform and consistent when, on remand, the regulations are in part repromulgated and applied consistently with this opinion.[172]

Finally, we note that our holding as to the scope of section 504 in the unique context of commercial air transportation is consistent with the recent action of Congress in its Civil Aeronautics Board Sunset Act of 1984.[173] That statute provides in its section 14, "Access for Handicapped Persons," that the Secretary of Transportation, when exercising authority previously the CAB's,

> shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973, prior to issuing or amending any order, rule, regulation or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped persons.[174]

Of course, to mandate a consultation with the ATBCB is not to mandate an acceptance of its recommendations, which in this case were to require not only a broad reading of section 504 but also affirmative ac-

[172] *See, e.g., infra* notes 207-11 and accompanying text.

[173] Pub. L. No. 98-443, 98 Stat. 1703, 98th Cong., 2d Sess. (Oct. 4, 1984).

[174] 98 Stat. at 1711.

tion in the form of the structural modification of aircraft.[175] Still, this recent demonstration of the continuing concern of Congress for the accessibility *not only* of commercial airports *but also* of "commercial air transportation" for handicapped persons is significant.[176] It suggests strongly that the Rehabilitation Act of 1973 was designed and is still intended to protect handicapped air travelers as a matter of law not only before they board an aircraft and after deplaning, but while they are inside the airplane as well. And it reinforces our view that Congress meant and still means handicapped persons to be free from discrimination whenever reasonably possible—not merely when, in the special context of air transportation, handicapped passengers happen to fly a small subsidized airline to a remote town, or are lucky enough to find a large carrier treating them fairly out of courtesy.

B. *The Substance of the Rules*

As we have already indicated, the record in this case suggests that in its promulgation of specific, substantive regulations the CAB worked conscientiously and, in an area characterized by great individual variability and acute sensitivity, managed reasonably to resolve many difficult problems.[177] This characterization applies equally to the Board's promulgation of the two specific sections of the substan-

[175] *See supra* note 154.

[176] Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. Red Lion Broadcasting v. FCC, 395 U.S. 367, 380-81 (1969).

[177] *See, e.g.,* notes 54-63 and accompanying text.

tive regulations that petitioners challenge here.[178] However, because certain aspects of the challenged Rule would have been drafted differently if the Board had properly construed the scope of its rulemaking authority under section 504, we remand the regulations in part for reconsideration in light of today's holding.

1. *The Definition of "Qualified Handicapped Person"*

Under the CAB's final regulations, only a "qualified handicapped person" is protected by section 504.[179] The statute itself uses the term "otherwise qualified handicapped individual," [180] which the Supreme Court has defined as "one who is able to meet all of a program's requirements in spite of his handicap." [181]

In the context of air transportation, the Board's regulation now defines such an individual as a handicapped [182] person

[178] *See* notes 64-66 and accompanying text.

[179] Amended Final Rule, 47 Fed. Reg. at 51,858. As noted *supra* note 64, this definition incorporated minor changes from the Final Rule, in order to accommodate, for example, a "person" who was not a "passenger" (e.g., someone merely seeking information), and in order to clarify an earlier phrase designed to minimize "arbitrary or impulsive" reactions by airline personnel resulting in requests "beyond standard practices." Instead, the Amended Final Rule mandates that "requests of airline personnel must be safety-related or necessary for the provision of air transportation to be considered reasonable" for the purposes of the rule. *Id.*

[180] 29 U.S.C. § 794 (Supp. V 1981).

[181] Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

[182] *See supra* note 28.

(1) Who tenders payment for air transportation;

(2) Whose carriage will not violate the requirements of the Federal Aviation Regulations . . . or, in the reasonable expectation of carrier personnel . . . , jeopardize the safe completion of the flight or the health or safety of other persons; and

(3) Who is willing and able to comply with reasonable requests of the airline personnel or, if not, is accompanied by a responsible adult passenger who can ensure that the requests are complied with. A request will not be considered reasonable if—

(i) It is inconsistent with this part; or

(ii) It is neither safety-related nor necessary for the provision of air transportation.[183]

Petitioners contend that by selectively imposing requirements on handicaped persons which are not imposed upon other passengers and prospective passengers, the CAB's definition of "qualified handicapped person" violates section 504. In addition, they argue that the definition lacks objective guidelines or criteria that would limit arbitrary, unreasonable, dis-

[183] Amended Final Rule, 47 Fed. Reg. at 51,858 (to be codified at 14 C.F.R. § 382.3). This definition is to be applied with respect to the provision of air transportation only. The CAB's definition "with respect to the provision of related services" (such as access to flight information) requires that a handicapped person meet "the essential eligibility requirements for receipt of those services." Amended Final Rule, 47 Fed. Reg. at 51,858 (to be codified at 14 C.F.R. § 382.3(d)). Petitioners do not challenge the legality of the latter definition.

criminatory requests or demands by airline personnel.[184]

The record reveals, and it is uncontested, that numerous incidents of arbitrary refusals of service and of irrational decisions by airline personnel concerning the qualifications of handicapped individuals have occurred.[185] Unwarranted assumptions and stereotypes have clearly caused airline personnel to discriminate against disabled passengers.[186] Yet, the record suggests that the Board was sensitive to such concerns and others voiced by handicapped individuals and their representatives,[187] and it is far from clear that amending the definition of "qualified handicapped individual" would provide any remedy more

[184] PVA Brief at 51; *see supra* text accompanying note 54.

[185] *See, e.g.*, Letter from Al Van Nevel to President, Ozark Airlines (May 17, 1979), J.A. at 175 (airline refused to begin flight after discovering five hearing-impaired persons on board); Letter of Marianne J. Cashatt, Director, Special Services, Virginia Department of Rehabilitative Services to CAB (Nov. 12, 1979), J.A. at 69 (on-board attendant required for person who needed no assistance once aboard the plane); *see also* Washington Post, Dec. 18, 1984, at A-17, col. 2 (airline charged with discriminating against passengers who are both blind and deaf by forcing them to travel with a companion).

[186] *See, e.g.*, Comments of National Federation of the Blind to the CAB, J.A. at 174 (blind couple asked to sit on blankets, apparently due to assumption that all handicapped people are incontinent); Letter of Nancy L. Kaye, Ph.D. to Congressman Robert Kastenmeier (March 14, 1980), J.A. at 66 ("airline personnel shouting at me because they believe I am deaf, speaking slowly because I may be mentally impaired and/or using a condescending tone of voice because they assume I am a child . . . .").

[187] *See, e.g.*, notes 13, 35, 61-63 and accompanying text.

meaningful than that provided by the rules as they now exist.

Decisions involving safety, especially, require the granting of a certain amount of discretion to airline personnel. Individuals differ considerably, sometimes dramatically, in their abilities as well as in their disabilities. What is an unreasonable or unwarranted request when made of one handicapped person may be perfectly legitimate when made of another. Because of the unique nature of every individual, because of the infinite variety of disabling conditions and the varying extent to which they may handicap a particular person, the vesting of some discretion in airline personnel to make case-by-case determinations is unavoidable. This is especially so where, just as individuals differ, so do airlines and aircraft. A wide-bodied jet may present different safety concerns or space limitations than a smaller jet or a much smaller piston-powered aircraft.[188] In this situation, some discretionary decisionmaking on the part of airline personnel is inevitable.

The risk that arbitrary or irrational decisions may occasionally be made, of course, follows the grant of decisional discretion as night follows the day. The final regulations promulgated by the CAB, however, have significantly limited the discretion of airline personnel.[189] For example, section 382.13(a) of the Final

[188] As respondents note, even carriers using essentially identical aircraft may utilize alternative design configurations for the plane's interior, for example, utilizing denser seating arrangements or less room for carry-on luggage than their competitors. Respondents' Brief at 37.

[189] This is so despite the fact that, as explained *supra* notes 54-63 and accompanying text, maximum flexibility was granted to airlines in several specific instances. The Board

Rule creates a presumption that every handicapped person is a "qualified handicapped person unless a carrier has a *reasonable, specific basis* for doubting those qualifications." [190] Moreover,

> A carrier shall not refuse transportation to the handicapped person unless an agency or *employee designated* by the carrier to make such determinations and *familiar with the carrier's standards* and procedures for such determinations *reasonably believes on the basis of available information, including any presented by the handicapped person*, that the person is not a qualified handicapped person.[191]

Section 382.13(e) requires that "[t]he name of the employee designated by the carrier to refuse service or require an attendant . . . shall be made known to ticket and reservation agents, who shall inform any person who requests that name." [192] From the outset, any request made of a handicapped person must be reasonable and either "safety related" or "necessary for the provision of air transportation." [193] And, of course, no carrier may "[e]xclude a qualified handicapped person from or deny that person the benefit of any air transportation or related services that are available to other passengers . . . ." [194]

did not, we believe, ever lose sight of the "strong countervailing interest" of the handicapped. *See supra* note 62.

[190] Final Rule, 47 Fed. Reg. at 25,949 (emphasis added).

[191] *Id.* (emphasis added).

[192] *Id.*

[193] *See supra* note 179 and accompanying text.

[194] Final Rule, 47 Fed. Reg. at 25,948 (§ 382.5(a)); nor may a carrier provide "separate or different" services that are

Thus, we are not presented with a case of unbridled discretion but instead with a situation where discretionary, case-by-case decisions are mandatory. We are not presented with a case involving relatively unambiguous distinctions based upon gender or race but instead with the endless complexities of handicapping conditions. And we are not presented with regulations applying to any service—or even any transportation—industry but to a unique industry that carries its clients tens of thousands of feet above the earth at hundreds of miles per hour. Safety and "air transportation" requirements go to the very essence of commercial aviation and must be applied not only to handicapped persons but to all passengers.[195] In its efforts to do so without discrimination, the Board sought to define "qualified handicapped person" in a manner that "removes the subjective aspects of the standard to the maximum extent possible consistent with our need to defer in the first instance to the reasonable judgment of carrier personnel on safety questions."[196] In that regard, it has succeeded. We surely cannot say that "the agency's decision . . . manifests a clear error in judgment,"[197] or that the definition challenged here in any way

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unwanted or unnecessary. *Id.* (§ 382.5(b)); *see supra* notes 23, 24 and accompanying text.

[195] *See, e.g.,* Bargmann v. Helms, 715 F.2d 638 (D.C. Cir. 1983) (emphasizing strong and comprehensive concern of Congress for "maximum possible safety" in the air).

[196] Final Rule, 47 Fed. Reg. at 25,939.

[197] Action for Children's Television v. FCC, 564 F.2d 458, 472 (D.C. Cir. 1977); *see also* United States v. Allegheny Ludlum Steel Corp., 406 U.S. 742, 758 (1972).

lacked "a rational basis."[198] Accordingly, petitioners' challenge to the definition is denied. If arbitrary or unreasonable decisions do occur under that definition or the regulations to which it applies, the remedy lies in enforcement proceedings or other corrective action under Subpart C of the Rule.[199]

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[198] National Small Shipments Traffic Conference v. CAB, 618 F.2d 819, 826-27 (D.C. Cir. 1980) (reviewing court "must affirm the challenged regulations unless we find that the Board's decision was 'arbitrary and capricious,' or in excess of its statutory authority, or adopted without observance of the procedure required by law").

[199] This "compliance" subpart of the Final Rule, *see supra* notes 39-45 and accompanying text, modified the original proposal by, *inter alia,* making it

> clear that individual complaints will be processed according to the Board's standard enforcement procedures, and that the Board may assess civil penalties or issue an order to cease and desist rather than withdraw financial assistance.

Final Rule, 47 Fed. Reg. at 25,947. Evidently, the Board was concerned that withdrawal of federal subsidies (the only "assistance" it considered at the time) might be too draconian a sanction in certain cases.

"In withdrawing financial assistance," the Board reasoned,

> the Board is limited to a suspension or termination of financial assistance to the particular program or activity with respect to which there has been a finding on noncompliance. In the case of a carrier receiving separate subsidies under section 419 of the Act for serving several eligible points, we view this limitation as permitting us to withdraw the subsidy only for the route or routes where the violation occurred. Carriers receiving subsidy under 406 of the Act would not benefit from this limitation to the same extent because the financial assistance they receive is intended to help their entire system. Thus, a violation of any part of their subsidy-eligible

2. *The Forty-Eight Hour Notice Requirement*

Section 382.15(c) of the CAB's final regulations permits airlines to require all handicapped passengers who will need "extensive special assistance" to notify the airline forty-eight hours in advance of their flight.[200] "Extensive special assistance" was defined in the Final Rule as including:

(1) Medical oxygen for on-board use;

(2) Boarding and deplaning assistance using mechanical boarding lifts, aisle chairs, other special equipment, or requiring the presence of more than the usual complement of personnel; and

(3) Ground wheelchairs at facilities where they are not usually available.[201]

In response to further comment from groups representing the handicapped, the Board amended its Fi-

system may justify the withdrawal of the section 406 subsidy.

Id.

In view of our holding today, this sort of hair-splitting about federal financial assistance to commercial air carriers becomes moot and will be deleted, we assume, on remand. Correspondingly, however, the Board's decision to emphasize that such options as cease and desist orders and the assessment of civil penalties are available to the agency as sanctions of air carriers found to violate the Rule becomes even more important. We assume that denying an offending carrier access to federally-assisted airports in general or to a particular airport on a particular route is likely to be a sanction seldom applied, at the agency's discretion, primarily in egregious cases.

[200] Final Rule, 47 Fed. Reg. at 25,949.

[201] *Id. Cf. supra* note 37 and accompanying text (Proposed Rule).

nal Rule to prohibit carriers from refusing assistance "on the ground of inadequate notice if the service or equipment is available with the lesser notice given."[202] Petitioners nevertheless challenge the forty-eight hour notice requirement as arbitrary, overbroad, discriminatory and inconsistent with the mandate of section 504.[203]

We disagree. Here again, a balance must be struck between furthering the nondiscriminatory purposes of section 504 and allowing for the practicalities of providing special assistance. As we have noted, the Supreme Court (in the context of education) and this court (in the context of urban mass transportation) have held that extensive, extremely expensive modifications of existing programs may impose such substantial affirmative burdens that they cannot be required under section 504.[204] The record reveals that with respect to its advance notice rule, as elsewhere, the Board conscientiously and rationally sought to implement section 504 in a manner likely to be reasonable and effective.[205] As a reviewing court, we can

[202] Amended Final Rule, 47 Fed. Reg. at 51,858. The final regulations also indicate that a carrier may not refuse to provide "extensive special assistance" if necessary equipment or personnel can be made available "by reasonable efforts . . . without delaying the flight." Final Rule, 47 Fed. Reg. at 25,949 (§ 382.13(d)).

[203] *See supra* note 66 and accompanying text.

[204] *See supra* note 155.

[205] Here the Board was being especially solicitous of the small, subsidized airlines which were, in its opinion at the time, the only carriers to which its regulations would apply. It expressed its concern "that Federal regulatory requirements not be so burdensome that airlines will be discouraged from volunteering to provide essential air service to small

require no more.[206]

Nevertheless, it is clear that when the CAB fashioned this rule, the Board was assuming its application primarily to small air carriers—those least likely to be able to provide special assistance without suffering a substantial financial burden.[207] It conceded that "some carriers now provide such services on 24 hours' notice," but argued that "many, especially smaller carriers, may not be able to do so." [208] Respondents expand upon this point by noting the

> undue burdens for small airlines operating at small airports or airfields where facilities and equipment are extremely limited. For example, if an airline operates between a number of small facilities that do not receive Federal financial assistance and do not provide ground wheelchairs, it should not be required to maintain a wheelchair at each airport.[209]

If such reasoning formed the basis of the forty-eight hour notice requirement below, that requirement will, of course, need to be reconsidered on remand. Under our holding today, such small carriers will be a minority of the carriers subject to the regulations implementing section 504. Should the rule be redrafted in accordance, for example, with the comments regarding notice requirements made by both

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communities or be forced out of business altogether." Final Rule, 47 Fed. Reg. at 25,940.

[206] *See supra* notes 197, 198 and accompanying text.

[207] *See supra* note 205.

[208] Final Rule, 47 Fed. Reg. at 25,945.

[209] Respondents' Brief at 42, 43.

the Architectural and Transportation Barriers Compliance Board [210] and the Department of Transportation,[211] an exemption may need to be provided for the small carriers.

3. *The Rule on Remand*

The Airline Deregulation Act of 1978 provided for the sunset of the Civil Aeronautics Board and the transfer to other agencies, effective January 1, 1985, of those CAB functions that are to continue.[212] As

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[210] The ATBCB saw "no need to set a time limit on notice that a wheelchair will be needed, as it is a simple matter to have these available. It may be reasonable to require four or five hours' notice when a lift will be needed so that the airport can assure its availability; but in an emergency, where the handicapped passenger cannot give the required notice, the airline should be required to board the passenger in some manner. We understand the need for advance notice for oxygen and special meals. However, we urge that the notice requirement . . . be limited to 24 hours (the notice now required by several airlines such as American and United [and TWA]) . . . . It is our hope that when services for the handicapped are more fully integrated into routine air travel, advance notice will become unnecessary." Comments of the Architectural and Transportation Barriers Compliance Board before the Civil Aeronautics Board, *supra* note 156, J.A. at 151, 152.

[211] The DOT stated that "the 48 hours advance notice suggested by the Board is unduly long. Provision of wheelchairs would not appear to require any unusual effort or training on the part of airline employees; and many airlines already provide wheelchairs for handicapped passengers during boarding of aircraft, without advance notice . . . Any advance notice requirement which may be imposed should be filed by each carrier and justified to the Board as reasonable." Comments of U.S. Department of Transportation before the Civil Aeronautics Board, Sept. 13, 1979, J.A. at 81-82.

[212] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.).

specified further by the Civil Aeronautics Board Sunset Act of 1984, the vast majority of functions performed by the Board before it ceased to exist have been transferred to the Department of Transportation.[213] Among these transferred functions—and substantial enough in the consideration of Congress to have been one of sixteen prominently captioned sections—was the furtherance of "the accessibility of commercial airports or commercial air transportation" to handicapped persons." [214] On account of our holding today, vacating the CAB's restrictive reading of its rulemaking authority and ordering any regulations promulgated under section 504 to be applied to essentially all air carriers, the DOT will have an opportunity, on remand, to fashion a Nondiscrimination Rule that is consistent with its current regulation of airports, its own understanding of the CAB's regulatory authority over air carriers as expressed throughout these proceedings, and the intent of Congress.[215]

On remand we expect the DOT to act with expedition. We have affirmed the specific provisions of the CAB's regulations challenged by petitioners. The Department may, as we have indicated, wish to take another look at certain aspects of the Final Rule that appear to have been drafted with small carriers in mind. It may wish then to specify certain exemptions for such carriers if changes are made to reflect the wider applicability of the rules to this nation's major commercial airlines. Certainly the Department will need to make some non-substantive deletions of language, and it may wish otherwise to economize editorially. By now, however, a dozen years have passed since Congress enacted section 504.[216] It is time that a handicapped person's right of reasonable access to nondiscriminatory commercial air transportation had the force of law.

[213] Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703; *see also* Notice of Proposed Rulemaking, Transfer of Civil Aeronautics Board Functions to DOT, 49 Fed. Reg. 46,006 (Nov. 21, 1984).

[214] *See supra* notes 173, 174 and accompanying text.

[215] *See supra* notes 132, 134, 169-176 and accompanying text. The intent of Congress, indeed, will be vindicated in several respects: not only will handicapped persons have greater access to commercial air transportation, but unnecessarily confusing—in some cases duplicative or overlapping, in other cases inconsistent or nonsensical—regulations will be rationalized under the aegis of a single agency.

III. Conclusion

The regulations promulgated by the Civil Aeronautics Board to implement section 504 of the Rehabilitation Act of 1973 are vacated with respect to the Board's determination that they could be applied only to air carriers receiving direct money subsidies from the federal government.[217] They are affirmed in

[216] The CAB and other agencies have sometimes seemed reluctant to act upon their statutory obligations in this area, requiring prodding from other agencies, the President, and the courts. *See supra* notes 5-12 and accompanying text. In this regard the DOT has been generally more vigorous, as reflected in its regulation of airports, its early willingness to regulate air carriers if the CAB had not asserted its own jurisdiction, and its comments in the proceedings below.

[217] In a recent case involving air safety this court similarly found the FAA's "attempt to limit artificially its regulatory authority . . . unreasonable." Bargmann v. Helms, 715 F.2d 638, 642 (D.C. Cir. 1983) (Mikva, J.). We have been presented in the instant case, as we were in *Bargmann*, essentially with an agency's refusal to exercise its discretion, based on its belief that it has no power to do otherwise. In this

all other respects, but remanded to the Board's successor agency, the Department of Transportation, with orders to redraft the rules to the extent necessary to apply them to all commercial air carriers in a manner not inconsistent with this opinion.

So ordered.

> situation, while the agency has the first word on its regulatory jurisdiction, it does not have the last. It is well within the tradition of our review of agency action . . . to make an independent inquiry into an agency's allegation that it lacks the statutory authority to act.

Id. at 641 (citations omitted). *See also* Exxon Corp. v. FTC, 665 F.2d 1274 (D.C. Cir. 1981); NAACP v. FPC, 520 F.2d 432 (D.C. Cir. 1973), *aff'd,* 425 U.S. 662 (1976); National Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974). Where, as here, the agency's own "first word" has been inconsistent—construing its own authority first broadly, then narrowly—this court's obligation of independent inquiry on review is greater still, and any deference due the agency on the jurisdictional issue is correspondingly minimized.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1984

No. 83-1055

PARALYZED VETERANS OF AMERICA, ET AL.

v.

CIVIL AERONAUTICS BOARD, ET AL.

[Filed April 26, 1985]

ORDER

Before: WALD and MIKVA, *Circuit Judges,* and BAZELON, *Senior Circuit Judge*

Upon consideration of respondents' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1055

PARALYZED VETERANS OF AMERICA,
AMERICAN COALITION OF CITIZENS WITH
DISABILITIES, AMERICAN COUNCIL OF THE BLIND,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD,
FEDERAL AVIATION ADMINISTRATION,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
RESPONDENTS

REGIONAL AIRLINE ASSOCIATION, INTERVENORS

On Respondents' Suggestion For Rehearing En Banc

[Filed April 26, 1985]

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges.*

Respondents' suggestion for rehearing *en banc* has been transmitted to the full Court. A majority of the judges of the Court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

A dissenting opinion filed by Circuit Judge Bork is attached and is joined by Circuit Judges Scalia and Starr.

BORK, *Circuit Judges*, with whom *Circuit Judges*, SCALIA and STARR join, *dissenting*: The panel opinion in this case conflicts with the Supreme Court's decision in *Grove City College v. Bell*, 104 S. Ct. 1211 (1984). For that reason, this case should be reheard *en banc*.

In a final rulemaking, the Civil Aeronautics Board ("CAB") determined that only those airlines receiving a direct subsidy under the Federal Aviation Act are federally assisted within the meaning of section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982). This court held, however, that all activities of commercial airlines are federally assisted programs or activities because the airlines make use of airports that accept federal funds under the Airport and Airway Improvement Act of 1982. Thus, all airlines, regardless of whether they receive direct federal assistance, are subject to section 504. The court vacated CAB's rulemaking and ordered CAB to promulgate regulations pursuant to section 504 to be applied to all airlines. Airlines are transformed into "recipients" of federal assistance, according to the panel, because airports and the facilities are "inextricably intertwined" with and "indispensable" to air travel. *Paralyzed Veterans of America* v. *CAB*, 752 F.2d 694, 712, 715 (D.C. Cir. 1985).

This reading of section 504's statutory language would make every commercial enterprise a "recipient" of federal aid when it merely makes use of a service or facility that receives any federal assistance. That idea has great potential. Trucking and bus companies use federally constructed and maintained highways, and their businesses are thus inextricably intertwined with a federally assisted program. Many electric companies rely on dams constructed and maintained with federal funds. Without the National Weather Service farmers would be unable to plan, protect, and cultivate their crops in an effective manner. It ought surely to be true that federal funding of federal courts results in the regulation of law firms since courts are inextricably intertwined with and indispensable to lawyering.

It is clear that the panel has not followed the decisions in *Grove City* and *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). These decisions are especially apposite because they interpret civil rights legislation upon which section 504 was modeled. As the panel opinion recognized, "courts have duly noted the extent to which the language of [section 504 of the Act] corresponds to that of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, frequently applying the case law developed in those areas to the resolution of problems arising under the Rehabilitation Act." 752 F.2d at 707 (footnotes omitted).[1]

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[1] Section 504 provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance* . . . .

29 U.S.C. § 794 (1982) (emphasis added).

Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance.*

42 U.S.C. § 2000d (1982) (emphasis added).

[Continued]

In *North Haven*, the Court concluded that Title IX's reach is limited by its "program-specific" language. The Court rejected an institution-wide approach, as inconsistent with the language and legislative history of the statute. 456 U.S. at 536-38.

In *Grove City*, the Court again rejected the institution-wide approach and defined "program or activity" by limiting coverage of Title IX to only those "programs or activities" specifically funded by the federal government, even if those programs were part of a larger whole. 104 S. Ct. at 1220-21. The Court held, therefore, that tuition grants to students did not allow the grant agencies under Title IX to regulate all programs at the school. The purpose of tuition grants is to assist the school's financial aid program and that is the only program considered to have received federal funds under Title IX. *Id.* at 1221. Under *Grove City*, the airlines here are clearly not "recipients" of federal funds. The airports are, and the ground activities of the airlines integral to the operation of the airport may be, subject to section 504. However, the non-airport activities of the airlines, such as in-flight procedures, are outside the scope of that section.[2]

[1] [Continued]

Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance* . . . .

20 U.S.C. § 1681(a) (1982) (emphasis added).

[2] Indeed in previous regulations under Title VI, the Federal Aviation Administration recognized that in the case of aid to airports, the scope of "program or activity receiving Federal

The panel's attempts to distinguish this case from *Grove City* are wholly unpersuasive. It would unduly extend this dissent, however, to deal with those contentions in detail. The Supreme Court has been over this ground, and we ought to accept, rather than evade, its conclusion.

I would grant the petition.

assistance" only reached operations at the airport and not air transportation:

> (2) The operator of an airport who is the recipient of Federal financial assistance is bound by the conditions and covenants in the conveyance that prohibit, among other things, discrimination for reason of color, race or national origin in admission of the public to waiting rooms, sightseeing areas, sanitary facilities, and any other facilities under the control of the airport operator himself.

14 C.F.R. § 15.5(c)(2) (1968). The successor regulation, 49 C.F.R. Part 21, Appendix c(a)(2) (1984), was expanded to clarify that any activity physically taking place in the airport was covered even if the airlines leased or bought the space.

APPENDIX D

EXCERPTS FROM THE PREAMBLE TO THE FINAL RULE PROMULGATED BY THE CAB

14 CFR Part 382

[Special Reg. SPR-189, Enactment of Part 382; Dockets: 34030, 39963]

Nondiscrimination on the Basis of Handicap

AGENCY: Civil Aeronautics Board.

ACTION: Final rule.

SUMMARY: The CAB is adopting new rules to prohibit unlawful discrimination against disabled air travelers and to implement section 504 of the Rehabilitation Act of 1973. The purpose of the rules is to ensure that handicapped persons receive adequate air transportation service, without unjust discrimination based on handicap.

DATES: Adopted: June 3, 1982. Effective: Subpart A on June 15, 1982. Subparts B and C on September 13, 1982, except for §§ 382.11, 382.12, and 382.15 which will take effect on December 12, 1982.

FOR FURTHER INFORMATION CONTACT: About this rule—David Schaffer, Office of the General Counsel, Rules and Legislation Division, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428, 202-673-5442; about a specific instance of discrimination—Consumer Assistance Division, Office of Congressional, Community, and Consumer Affairs, Civil Aeronautics Board, 1825

Connecticut Avenue, NW., Washington, D.C. 20428, 202-673-6047.

SUPPLEMENTARY INFORMATION: By SPDR-70, 44 FR 32401, June 6, 1979, the Board proposed rules to ensure that handicapped travelers have adequate access to air transportation and to prohibit unjust discrimination against them. These rules implement section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination against otherwise qualified handicapped persons in activities or programs receiving Federal financial assistance. In SPDR-70, the Board proposed general rules prohibiting discrimination, and specific rules to limit air carriers' discretion to refuse to carry disabled passengers or to require them to be attended, to require airlines to provide certain services and assistance to handicapped travelers on request, and to establish compliance procedures. The notice also requested comment on whether the Board should require low-cost structural modifications of aircraft to increase their accessibility.

We received a large number of comments from airlines, groups representing disabled people, government agencies, flight crew unions, and others. In addition, many individuals commented on the proposed rule. After reviewing the comments, we have decided to adopt the basic framework of the proposed rules, but to make changes in several of its provisions. The following discussion covers both general jurisdictional issues raised by the commenters and changes in individual provisions.

Jurisdictional Issues

Section 504 of the Rehabilitation Act applies only to air carriers that receive Federal financial assist-

ance. In SPDR-70, however, the Board proposed, in the alternative, to apply this rule to all subsidized and unsubsidized certificated air carriers and air taxis, or to all these carriers in their operations with aircraft of more than 30 seats. The Board relied on section 404 of the Federal Aviation Act as authority for the broader coverage. That section requires carriers to provide "adequate service" and prohibits them from engaging in unjust discrimination.

The Air Transport Association (ATA) and several individual airlines objected to the Board's adoption of rules on the handicapped. They contended that the Board should not adopt such a rule because the regulations of the Federal Aviation Administration (FAA) in this area are adequate. Dual regulation, in their view, would be redundant, confusing, and, in some cases, conflicting. If such a rule were adopted by the Board, the carriers argued that it should apply only to subsidized airlines, because section 504 of the Rehabilitation Act applies only to airlines that receive subsidies directly from the Board. They also oppose the broader coverage of the proposal because the basis for that approach (section 404) is slated to expire when the Board sunsets. Citing *Continental Airlines v. CAB*, 522 F.2d 107 (D.C. Cir. 1974), some carriers argued that the Board's adoption of the proposed regulations would violate section 401(e)(4) of the Federal Aviation Act.

Other commenters, however, disagreed. In joint comments, the Disability Rights Center and several other groups representing the disabled (hereinafter the DRC commenters) argued that all airlines receive direct and indirect Federal financial assistance in the form of air traffic control services, airport development grants, operating certificates giving ex-

clusive domain over valuable air routes, and tax subsidies (special investment tax credit treatment under 26 U.S.C. 46(a)(8)), and therefore should all be subject to this rule. The U.S. Architectural and Transportation Barriers Compliance Board, a Federal agency responsible for promoting accessibility for the handicapped, agreed with this position. Although the Civil Aeronautics Board is not the source of this assistance, the DRC commenters stated that the Department of Health, Education and Welfare (now Health and Human Services), in its role as coordinator of administrative implementation of section 504, has designated the Board as the agency responsible for government-wide implementation of the statute with respect to airlines, and argued that Board rules should govern their activities.

The DRC commenters also defended the Board's jurisdiction to apply the rule to all airlines under the Federal Aviation Act. They pointed out that the Board relied on the adequate-service provision of section 404(a), as well as the nondiscrimination provision in section 404(b). The requirement that airlines provide adequate service is not scheduled to expire. They stated that Congress intended the Board to regulate until its sunset, and that Congress has yet to consider the issue of whether various consumer protection functions of the Board will transfer to its successor agencies. While acknowledging that section 401(e)(4) of the Act limits the Board's authority to restrict carrier discretion in changing schedules, equipment, accommodations, and facilities, the DRC commenters distinguished the *Continental case* from the situation here. In Continental, they argued, the Board's action in establishing fare differentials based on seating configurations did not further any statu-

tory goals. Here, in contrast, section 401(e)(4) must be balanced against section 404, as the court did in *Capital Airlines v. CAB*, 281 F.2d 48 (D.C. Cir. 1960), holding that the Board could order airlines to operate more flights in order to provide adequate service.

After considering the comments of the DRC, we have decided that we cannot accept their very broad definition of "Federal financial assistance." In our view, only subsidy paid under either sections 406 or 419 of the Federal Aviation Act qualifies. While an operating certificate may be of some value, it no longer gives airlines exclusive domain over routes, see section 1601(a)(1)(C) of the Act. It therefore presents a situation similar to *Gottfried v. Federal Communications Commission*, 655 F.2d 297 (D.C. Cir. 1981), where it was held that broadcast licenses do not count as financial assistance within the meaning of section 504. Although airports may be recipients of Federal financial assistance and therefore subject to the rules of the Department of Transportation issued under section 504, this does not mean that airlines serving those airports are also covered. In *Angel v. Pan American World Airways, Inc.*, 519 F.Supp. 1173, 1178 (D.C. 1981), the court stated that to "hold that commercial airlines fall within section 504 merely because of assistance provided to airports would expand improperly the accepted proposition that section 504 is limited to direct recipients of Federal funds." It is the position of the FAA, with which we concur, that its air traffic control services and other programs are not financial assistance to airlines. Rather, they are services provided to the public generally to ensure flight safety.

Some commenters cited cases involving Title VI of the Civil Rights Act of 1964 as justification for a

broad reading of "Federal financial assistance" in the Rehabilitation Act. They noted that both are civil rights statutes and therefore should be given a broad interpretation, *Griffin v. Breckenridge*, 403 U.S. 88 (1971). While section 504 was modeled on section 601 of Title VI, the Civil Rights Act viewed as a whole has a broader remedial purpose than the Rehabilitation Act. This may call for a narrower interpretation of financial assistance as employed in the latter statute. See *Cook v. Budget Rent-A-Car Corporation*, 502 F.Supp. 494 (S.D.N.Y. 1980). Even accepting the broad reading, however, the "indirect assistance" cited by the DRC does not qualify as "Federal financial assistance." In congressional hearings and floor debates prior to the adoption of the Civil Rights Act, speakers interpreted that term as referring to "funds" expended by the Federal government (*Civil Rights: Hearings before the House Judiciary Committee*), 88th Cong., 1st Sess. 2731 (1963) (statement of Attorney General Kennedy) and "public moneys out of the Federal Treasury," 110 Cong. Rec. 6430, March 26, 1964 (statement of Senator Humphrey) rather than to the type of indirect assistance cited by the DRC. A Justice Department study completed at the request of Congress in anticipation of the debate on Title VI listed the programs that would qualify as Federal financial assistance. The only CAB program listed was the section 406 subsidy program. See 110 Cong. Rec. 13380-13382, June 10, 1964. Section 419 was not listed because it was not enacted until 1978. While the Justice Department admitted that this list may not be exhaustive, it indicates that there are limits to the term "Federal financial assistance."

We also do not concur with the restrictive reading of our jurisdiction put forth by the airlines. Enact-

ment of the Rehabilitation Act reflects a national policy to ensure that disabled people have a reasonable opportunity to participate in the activities that others take for granted. Accommodating this group of potential travelers is an important element of providing adequate service, as required by section 404(a) of the Act. Unnecessary or arbitrary distinctions among passengers on the basis of handicap constitute unjust discrimination in violation of section 404(b) of the Act. It is our position that the prohibition of section 404(b) encompasses discrimination against handicapped passengers, that the Rehabilitation Act is the best source of interpretative guidance as to what is allowed and not allowed in this area as a matter of national policy, and that therefore the principle of that Act should be considered incorporated into section 404(b). Although section 404(b) sunsets on January 1, 1983, the adequate-service provision in section 404(a) continues.

We are adopting an approach to the jurisdictional question that represents a compromise between applying the rule to all carriers and having no rule at all. Relying on section 504 of the Rehabilitation Act and the requirements of section 404 of the Federal Aviation Act, we find the requisite authority to apply general provisions in Subpart A of this rule prohibiting discrimination against handicapped passengers to all certificated air carriers and to those commuter carriers that receive a subsidy from the Board. The specific requirements in subparts B and C of this rule, however, will apply only to those carriers receiving subsidy from the Board under sections 406 or 419 of the Act, in recognition of the limited jurisdictional basis of section 504. Those carriers subject only to the general provisions of Subpart A

should look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate.

Having decided to limit Subparts B and C of this rule to carriers receiving subsidy from the Board, a question remains as to which carriers will be covered. Both the local service carriers (Frontier, Ozark, Piedmont, Republic and Republic West) as well as the other carriers receiving subsidy under section 406 of the Act (Air Midwest, Skywest, Alaska Airlines, Wien Air Alaska, and Kodiak Western) are covered. Any carrier receiving subsidy under section 419(a)(5) or (b)(6) of the Act for providing essential air service to a small community must comply with the specific provisions of this rule. Also, any carrier that receives assistance through one of these carriers is subject to Subparts B and C. See § 85.3(d) of the HEW guidelines.

Some carriers receive compensation for losses under section 419(a)(7) of the Act when the Board orders them to continue providing essential air service that they wish to terminate. These carriers must continue to provide that service until the Board finds another carrier to provide it and allows the incumbent carrier to terminate as planned. The question whether payments to these carriers constitutes Federal financial assistance has been the subject of several comments in Docket 39963. Motions to file late, to intervene, and to file otherwise unauthorized documents were submitted in that docket, all of which we are granting here.

Docket 39963 was initiated by a letter dated July 15, 1981, from the Board's General Counsel to all carriers that received payments under section 419. This letter was required by an order of the U.S. District Court of the Central District of California in

Paralyzed Veterans of America, et al., v. William French Smith, et al., No. 79-1979 WPG. The Court ordered the Board to inform all subsidized carriers within 10 days that they were obligated to comply with section 504 of the Rehabilitation Act even though the Board had not yet issued its final section 504 rules. Due to the short time in which to act, the General Counsel sent the letter to all carriers that had received any payments under section 419 without attempting to decide whether all those payments constituted financial assistance under the Rehabilitation Act.

After receiving this letter, Delta Air Lines petitioned for review. It argued that the compensation for the losses it incurred after being required to continue service in the Boston-Preque Isle market did not constitute financial assistance such as to subject it to section 504. United filed an answer in support of Delta's petition. USAir filed a similar petition in connection with the forced service of one of its Allegheny commuters at six upstate New York and Vermont communities. The Air Transport Association of America, on behalf of 13 airlines, also filed a petition calling for a narrow reading of financial assistance. On the other side, Neil Jacobsen and the Paralyzed Veterans of America filed in support of a broad definition of financial assistance. They renewed the argument, disposed of above, that all airlines are recipients of indirect subsidies in addition to the direct subsidies under section 419.

Compensation for losses is typically paid to carriers only for the short time (about 6 months) that they are being required to continue the essential air service. It is often not clear whether the carrier has suffered any losses that would entitle it to compensation until it has been permitted to end that service.

The short-term and after-the-fact nature of this compensation makes it impractical for these carriers to comply with the specific requirements of Subparts B and C of this rule. The Board has therefore decided not to apply these subparts to carriers receiving payments under section 419(a)(7).

In light of this decision, it is unnecessary to determine whether compensation for losses constitutes Federal financial assistance under section 504. Recipients of these payments will have to comply only with the general prohibition against discrimination in Subpart A of this rule. This is no more than would be required of them under section 404 of the Federal Aviation Act in any event.

The Commuter Airline Association of America (CAAA) now the Regional Airline Association of America, and Air Atlantic, a commuter carrier, argued that the rule should not apply to any commuters as they are already facing increasing regulatory burdens. CAAA stated that rules requiring provision of equipment at each airport or modification of aircraft would have a disproportionate effect on commuters. According to CAAA, surface transportation is a viable alternative to most commuter flights, which average 111 miles.

We do not agree that commuter airlines have no obligation to serve handicapped travelers, especially when they receive public money to provide service. Many of the rules adopted here do not impose affirmative costs and burdens, but merely prohibit unreasonable limitations on travel by the handicapped. To the extent that costs are imposed, these can be taken into account in establishing the commuter's subsidy rate.

We recognize, however, that rules requiring the provision of special services and equipment may be

proportionally more burdensome on commuter airlines than on larger carriers. These rules may impose costs on commuters that outweigh their benefits. For that reason we have decided to apply this rule only to commuters receiving subsidy from the Board. That is the minimum requirement of the Rehabilitation Act. This approach is consistent with the Regulatory Flexibility Act, Pub. L. 96-354, which requires agencies to consider flexible approaches to the regulation of small businesses.

We do not agree with the airlines that the authority of the FAA over travel by the disabled is exclusive. We of course recognize the FAA's jurisdiction over flight safety issues, and our rules defer to that agency's expertise in several respects. In any event, the Rehabilitation Act and Executive Orders 11914 and 12250 call for us to issue regulations governing carriage of the handicapped by carriers that we subsidize.

Our rules do not merely duplicate existing FAA regulations. While one purpose of the FAA rules (14 CFR Part 121) is to prevent arbitrary refusals of service to disabled passengers, their primary goals is to ensure that airline procedures for carrying the handicapped are safe. The aim of the Board's rule, on the other hand, is not simply to ensure that the disabled are carried safely, but to ensure that they face no unreasonable, nonsafety-related obstacles to travel. To that end, this rule covers issues, such as provision of services and boarding assistance and limits on the airline's right to require a passenger to be attended, that are not reached by the FAA rules.

Nor do our rules conflict with those of the FAA or the Department of Transportation (DOT) generally. Where the potential for conflict is greatest, we have explicitly deferred to the DOT or FAA rules.

Where DOT, in its comments, suggested areas of potential overlap or conflict, we have made changes. DOT did not raise any objection to the Board's general exercise of jurisdiction in this area.

Finally, we agree with the DRC that these rules do not violate section 401(e)(4) of the Act. In our view, the impact they will have on airlines' facilities or accommodations is clearly justified by the other statutory goals to be achieved, *Capital Airlines v. CAB*, supra.

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OPPOSITION BRIEF

No. 85-289 (8)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, *ET AL.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *ET AL.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether federal financial assistance to commercial air transportation renders Section 504 of the Rehabilitation Act of 1973 applicable to the treatment and service of disabled passengers by commercial airlines.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is inadequate in three respects. First, the government misstates the court of appeals' holding. The court of appeals

did not hold that commercial airlines are subject to Section 504 of the Rehabilitation Act of 1973 simply "because the airlines have the use of federally assisted airports." Petition at 3. Rather, the court held that Congress intended to provide financial assistance to the program or activity of commercial air transportation, and that the flying of passengers on airplanes is an inseparable part of that program or activity. The court recognized that the Civil Aeronautics Board ("CAB") had violated Congress' intent in adopting rules which allowed disabled people to use ground facilities at airports, but which did not protect disabled people from discrimination if they wanted to fly on commercial airlines. In light of this Congressional intent, the court held that airlines cannot be allowed to deny disabled people the benefits of the

program of commercial air transportation

Second, the petition does not reveal the extent to which the CAB changed its position on the central issue in this case in the course of its rulemaking. Basic to the structure of the rules proposed in 1979 was the CAB's decision that under Section 504 "all passengers, regardless of handicap, should be given reasonable access to <u>commercial air transportation</u>...." 44 Fed. Reg. 32,402 (emphasis added). The 1979 proposed rules would have applied to <u>all</u> carriers, and would have exempted only aircraft with 30 or fewer seats. When the Final Rule was adopted in 1982, however, the CAB had reversed its position: rather than exempting small aircraft, it exempted large ones, by failing to apply its rules to major airlines.

The court of appeals found the CAB's explanations for this radical change

"inadequate, vague and contradictory." Petition App. at 57a. The government's effort to explain this change in its Statement of the Case is equally inadequate. The government suggests, Petition at 12-13, that the CAB reevaluated its jurisdiction in the course of rulemaking due to a "contraction of the Board's statutory authority" by the Airline Deregulation Act, which provided for the sunset of section 404(b) of the Federal Aviation Act. However, the CAB was fully aware of that statutory change well before it began its rulemaking in 1979: the Airline Deregulation Act was passed in 1978.

The rule finally adopted reflects the CAB's inability to explain its change of direction and its continued ambivalence about the nature of its authority. The 1982 Final Rule was an

admitted "compromise" that appeared to prohibit discrimination, but did not apply any specific obligations to the airlines. Rather, the rule cryptically suggested the airlines "look to" the specific requirements of the rule for guidance, but did not explain the legal basis for such a suggestion. Petition App. at 58a.

In short, in reviewing the rulemaking record, the court of appeals was not presented with a consistent and logically supported agency position. The court dealt with a rulemaking in which the CAB initially appeared to want to prohibit handicap discrimination by major airlines, but then changed its position without an adequate explanation. Despite these problems, the court of appeals deferred to the CAB's expertise on the substantive provisions of the rules. However, since the CAB did not appear to

have a clear idea of its own jurisdiction, and since the issue of the scope of Section 504 was a legal one, the court of appeals correctly made an independent inquiry into the question of the agency's authority. Petition App. at 75a n.217.

The government's Statement of the Case also fails to advise the Court of current regulatory proposals by the Department of Transportation ("DOT") which are relevant to an assessment of the practical impact of this case. Subsequent to the argument of this case but prior to the court of appeals decision, the DOT submitted proposed new Section 504 regulations to the Department of Justice for approval. A copy of what respondents believe are those proposed rules, which are not in the record in this case, has been submitted to the Clerk of the Court simultaneously with

the filing of this response. Those proposed rules are significant because they would have made the rules presently before this Court applicable to all commercial air carriers.

In proposing these new rules, the DOT stated, "The Department believes that it is appropriate that all carriers be subject to the entire regulation.... As a policy matter, it is reasonable to apply the same set of standards, and a common set of enforcement procedures, to all carriers, whether or not they receive a subsidy." Office of the Secretary of the Department of Transportation, Notice of Proposed Rulemaking (undated) ("Proposed Notice") at 4. The Department also recognized, "The primary function of an airport is to enplane and deplane passengers bound to and from other destinations. An airport cannot be said to operate for the fair use and benefit

of the public, without unjust discrimination, if would-be passengers cannot benefit from and participate in this primary function: obtaining air transportation services." Proposed Notice at 7. In evaluating the practical impact of its proposed rule, the DOT stated, "It is unlikely that making non-subsidized carriers subject to the more detailed standards of Subpart B will impose significant burdens upon them ... significant or costly changes in carrier practices should not be necessary." Proposed Notice at 4-5.

The Acting Solicitor General has confirmed that new rules concerning Section 504 were submitted to the Department of Justice by the DOT. He has also confirmed that on August 2, 1985 the Department of Justice refused to approve those rules for issuance. Copies of correspondence on this matter, which

is not in the record in this case, have been submitted to the Clerk of the Court.

ARGUMENT

The petition should be denied because

- -- the government has failed to identify any adverse effect which the court of appeals decision will have on the airlines or the government,
- -- the government has failed to explain how the holding of this case will have any impact outside its unique factual context, and

-- the government has not identified a conflict between the circuits which requires resolution by this Court.

Disregarding the intent of Congress and the obvious benefits of the decision for disabled people, the government seeks to engage the Court in speculation over the hypothetical scope, rather than the actual effect, of the court of appeals' ruling. The Court need not devote its resources to these merely theoretical issues.

I. THE COURT OF APPEALS DECISION REACHES A SENSIBLE RESULT WHICH HAS MINIMAL EFFECTS ON THE AIRLINES AND WHICH CARRIES OUT THE INTENT OF CONGRESS.

The Supreme Court should deny the petition because the court of appeals decision imposes no significant burdens on airlines or the Department of Transportation, and removes an anomalous

and irrational barrier to disabled people. The rulemaking record documented the absurd situation where a disabled person's rights were extinguished at the door of the aircraft. Prior to the court of appeals decision, a handicapped person was protected from discrimination in using the airport facilities, obtaining a ticket, checking baggage, and using the boarding ramp. However, once a handicapped person reached the end of the ramp and attempted to enter the aircraft, she could be denied transportation or be subjected to arbitrary and humiliating practices (such as a requirement that blind persons sit on blankets because of the airline's fear of incontinence). Members of the Paralyzed Veterans of America, American Council of the Blind, and American Coalition of Citizens with Disabilities, and many other handicapped persons, were repeatedly denied

transportation essential to their business activities, education, and ability to participate in society.

The rules adopted by the CAB did nothing to eliminate this discrimination. While the specific provisions of the CAB's rules (Subparts B and C) were a reasonable attempt to balance the interests of the airlines and their passengers, the CAB failed to apply those rules to actual air travel. In reviewing those rules, the court of appeals realized that antidiscrimination rules which apply to a miniscule number of aircraft and which do not cover actual air travel on commercial airlines are a nullity. The revision required by the court of appeals decision simply recognizes the practical reality that access to airport restrooms, ticket counters, baggage areas and boarding ramps is meaningless unless a disabled

person can fly on an airplane.

While this decision will have significant benefits for disabled people, it will not impose any undue burdens on the DOT or the airlines. As explained in the Statement of the Case, the DOT recently proposed to extend the coverage of the rules at issue here to all major airlines. The DOT therefore recognizes that the court of appeals decision does not require it to take on any unreasonable administrative obligations. Nor does the decision require the agency to assume responsibility for any activities that are beyond its expertise.

Further, the court of appeals decision will have little or no adverse effect on the airlines; indeed, the DOT itself has concluded that the rules would not impose any significant burdens or costs on the airlines. Application of the antidiscrimination rules to all

airlines would only require them to implement, on a uniform and predictable basis, procedures which many of them have already adopted. Those procedures require little financial expenditure and no extensive modification of any aircraft.1/

Access to transportation is paramount to a disabled person's employment, education, recreation and independence. Congress made clear that transportation services for handicapped individuals were a specific objective of Section 504. S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6388. The Court should deny the government's

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1/ No major airline intervened in the proceeding before the panel of the court of appeals. While the major airlines' trade association did attempt to file an *amicus* brief in support of the government's petition for rehearing, their proposed brief did not explain how the court of appeals decision would have any adverse effect on them.

petition because the court of appeals decision reaches a fair and practical result which effectuates Congressional intent.

II. THE COURT OF APPEALS DECISION IS LIMITED TO ITS FACTS AND DOES NOT PROVIDE AN OPPORTUNITY FOR CLARIFICATION OF GROVE CITY COLLEGE v. BELL.

The Supreme Court should deny the petition because the unique factual circumstances involved limit the precedential value of this case, and because the government has failed to explain how the decision will have any impact outside the particular context of commercial airlines. The court of appeals noted that the particular combination of facts and law before it was *sui generis*. "...[O]ur holding today is a narrow one which must be understood in the unique context of two intersecting

considerations.... Even at its most doctrinal, this is a case, above all, about access to airplanes and the Rehabilitation Act of 1973." Petition App. at 31a. As the extensive discussion in the rulemaking record and the court of appeals decision demonstrates, the financial interrelationships between airlines and airports are convoluted, and the operations of commercial airlines, airports, and the air traffic control system are virtually inextricable.

The peculiarly fact-specific nature of this case reduces the need for this Court to become involved in a complex analysis of a unique industry. The case does not, for example, offer a useful opportunity to refine the term "program or activity" as it is used in Grove City College v. Bell, 104 S. Ct. 1211 (1984). The only program specificity issue in this case is whether flying can be

separated from the ground activities of airlines; i.e., whether the treatment of passengers while in the air can be separated from the treatment of those passengers on the ground.

The court of appeals correctly found that it is irrational to break up air transportation into "flying" and all other support activities which are essential to flying. Ticketing, baggage handling and flying are all inter-dependent stages of the single program or activity of commercial air transportation. While these factual findings are consistent with the program-specific analysis in Grove City, it is unlikely that the analysis based on those particular findings will be applicable in other contexts. This is not an appropriate case in which to explore the Grove City standards

further.2/

Nor does this case offer a useful opportunity to elaborate on the distinction between "beneficiaries" and "recipients" of federal financial assistance. The court of appeals' application of the concepts of recipient and beneficiary to the facts of this case was consistent with well-established definitions of those concepts. Contrary to the government's suggestion, Petition at 20, a party may be a recipient even if it receives a benefit from federal financial assistance.3/ If such a party

2/ Legislation is currently pending in Congress which would substantially revise the result in Grove City. See H.R. 700 (the Civil Rights Restoration Act of 1985), 99th Cong., 1st Sess. 131 Cong. Rec. H134 (daily ed. January 24, 1985). The Court may wish to defer consideration of the issues raised by the government in its petition until Congress acts on that legislation.

3/ North Haven Bd. of Education v. Bell, 456 U.S. 512, 539 n.30 (1982).

is an essential intermediate entity which controls access to the benefits of federal assistance, that party is subject to the requirements of Section 504.4/ In the program or activity of commercial air transportation, the airlines are the vehicle, both literally and figuratively, through which passengers ultimately receive the benefits of government funds. The airlines are in the position of being able to deny those benefits to citizens, and should be considered recipients of federal assistance.

In sum, the court of appeals decision is not "boundlessly latitudinal" as the government suggests. Petition at 20. The decision involves a unique fact situation, to which the court of appeals correctly applied existing principles of

4/ See Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

antidiscrimination law in order to define the airlines' obligations. The Court should therefore deny the government's petition.

III. THE COURT OF APPEALS DECISION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS WHICH REQUIRES RESOLUTION BY THE SUPREME COURT.

Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), which arose prior to the sunset of the CAB and the antidiscrimination provisions of the Federal Aviation Act, does not create any conflict which requires resolution by this Court. Jacobson considered the applicability of Section 504 in a very limited context, and did not need to consider whether Section 504 by itself prohibits handicap discrimination by airlines. In contrast to Jacobson, Paralyzed Veterans squarely addressed the question of whether Congress intended to

terminate protection against discrimination at the threshold of commercial airplanes.

In considering any inconsistency between Jacobson and Paralyzed Veterans, it is critical to note that the substantive results in the two cases were the same -- both courts recognized that commercial air carriers cannot discriminate against passengers on the basis of handicap. Jacobson reached that result under Section 404(b) of the Federal Aviation Act, 49 U.S.C. §1374(b), which it held incorporated the "more frequently construed language of Section 504." 742 F.2d at 1205. While Section 404(b) had been revoked prior to the court's decision, the discriminatory act had occurred while the provision was still in effect and the court therefore applied it in considering plaintiff's

claim. To protect the plaintiff from discrimination, the Ninth Circuit did not need to reach the question of whether Section 504, standing alone without being incorporated by Section 404(b), applied to the defendant airline.

The government ignores the substantive result of Jacobson: the Ninth Circuit concluded that airlines could not discriminate against disabled people on the basis of their handicap. The government's argument suggests that Congress, in enacting the sunset provision of the Airline Deregulation Act of 1978, intended to allow the renewal of discriminatory practices previously declared unlawful. There is no support for such a conclusion in the language or legislative history of the Airline

Deregulation Act.5/ The government's argument also suggests that if the discrimination in Jacobson had occurred after the sunset of Section 404(b), rather than before, the Ninth Circuit would have denied the plaintiff any protection and permitted a discriminatory airline practice which it found was based on "precisely the type of stereotype that the Rehabilitation Act forbids." 742 F.2d at 1206.6/

5/ The government's conclusion also ignores a later explicit statement of Congressional intent to continue the protections against discrimination by airlines. That statement in the Civil Aeronautics Board Sunset Act of 1984 was relied on by the court of appeals in Paralyzed Veterans. Petition App. at 61a.

6/ The government states that there is no indication that the Jacobson court was aware of the sunset of Section 404(b). Petition at 25 n.16. Such a suggestion only serves to undermine further that decision's validity as a precedent. Whether the choice by the Ninth Circuit was conscious or uninformed, the absence of discussion on this issue reduces the usefulness of the decision to the merely historical.

The anomalous results of the government's argument about Jacobson suggest that the holding of that case is a very limited one. Further, to the extent that Jacobson and Paralyzed Veterans are doctrinally inconsistent, that type of inconsistency will not lead to confusion over the legal obligations of the DOT or the airlines. For the reasons noted above (particularly Jacobson's focus on revoked Section 404(b)), Jacobson is simply not as authoritative a precedent as Paralyzed Veterans.7/ More importantly, the two

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7/ While the government endorses that aspect of Jacobson which deals with the availability of attorney's fees under Section 504, it conspicuously declines to endorse the rationale behind the decision. Petition at 27 n.18. The government apparently recognizes the untenability of Jacobson's conclusion that the airlines are not recipients because they pay taxes which are roughly equivalent to the amounts returned to them out of the Airport and Airway Trust Fund. That conclusion is both factually inaccurate (since most of the

[Footnote continued on next page]

decisions do not create the prospect of inconsistency in the administration of a national program as the government suggests. Petition at 24. The DOT is bound by the decision in Paralyzed Veterans, and must adopt regulations applicable to all airlines. The airlines must comply with those regulations, unless they choose to challenge them in later litigation in another circuit.8/

7/ [continued]
taxes are paid by passengers, not the airlines, in the form of an excise tax on tickets) and overbroad (since it would exempt from the coverage of Section 504 any large taxpayer which could argue that it "pays" for any federal financial assistance it receives).

8/ Such litigation by airlines appears unlikely, since the regulations at issue impose no significant burdens or additional costs on the airlines. Not even the smallest airlines, whose trade association did intervene in the court of appeals, identified any specific provision of the rules which would be unreasonably burdensome.

Because of the nature of the parties and the procedural posture of Paralyzed Veterans, a consistent, nationwide regulatory structure will be created. If a decision in future litigation undermines that uniformity, this Court can review that later decision. At present, any lack of uniformity, and any confusion over the airlines' obligations, is entirely theoretical and should not engage the resources of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

(3)

No. 85-289

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PARALYZED VETERANS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Virtually the entire thrust of respondents' brief in opposition is that the regulations mandated by the court of appeals' decision would make good policy. See, *e.g.*, Br. in Opp. 7-8, 10-15. But that has never been the issue in this case, and it is in any event a matter more appropriately addressed to Congress than to this Court. Indeed, it is precisely because the court of appeals decided this case on the basis of its own notions of good public policy rather than a careful analysis of the legal constraints imposed by the language of Section 504 and this Court's decisions interpreting the "program specificity" requirement contained in the statute that we have sought review of the decision below. Because respondents have, for the most part, chosen to ignore the legal issues in contention, we make only a few brief points in reply.

1. In an obvious attempt to portray its decision as one of limited impact, the court of appeals "emphasize[d] * * * the extent to which the issue of discrimination against the handicapped, particularly in the complex realm of commercial air transportation, is *sui generis*" (Pet. App. 30a (footnote omitted)). Respondents seize on this language to argue (Br. in Opp. 16) that the "program or activity" issue in this case is "peculiarly fact-specific" to the airline industry and has no ramifications outside the context of this case. In fact, however, the issue goes to the very heart of this Court's decision in *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984).[1] As we explained in the petition (at 28-29), the clear teaching of *Grove City* is that the boundaries of a federally assisted program or activity are defined by the underlying grant statute. Thus, the coverage of Section 504 cannot legally extend beyond the program or activity conducted by or under the auspices of the grant recipient. It is the court of appeals' disregard of this statutory requirement, and not the peculiarities of the airline industry, that requires review by this Court.[2]

By misstating the government's position, respondents also argue (Br. in Opp. 18-19) that this case does not present

[1]Respondents note (Br. in Opp. 18 n.2) that legislation is pending in Congress that would alter the result reached by this Court in *Grove City*. The speculative possibility that such legislation might be enacted should not deter the Court from considering the important questions presented by this case. See *Bryant* v. *Yellen*, 447 U.S. 352, 380 n.32 (1980).

[2]Undoubtedly, virtually every federally assisted program or activity could be characterized as having unique factual aspects not shared by different programs. Indeed, the Court in *Grove City* itself characterized the student financial aid program there at issue as *sui generis*. *Grove City*, slip op. 16. But the inevitable factual distinctions among the diverse array of programs supported by the federal government cannot serve to insulate particular programs or activities from the "program specificity" mandate imposed by Section 504 and the other civil rights statutes on which it is modeled.

an appropriate vehicle for refining the distinction between a "recipient" of federal financial assistance and a "beneficiary" of that assistance. Contrary to respondents' apparent suggestion, we did not argue in the petition that "beneficiaries" and "recipients" are mutually exclusive. Clearly, an entity that receives federal financial assistance may also, in certain circumstances, benefit from that assistance. In this case, for example, airport operators are both beneficiaries and recipients. But not every beneficiary is automatically a recipient. To hold otherwise would, as the dissenting judges below recognized, "make every commercial enterprise a 'recipient' of federal aid when it merely makes use of a service or facility that receives any federal assistance" (Pet. App. 80a). Clearly, Congress never intended federal regulation to be so all—encompassing, and thus the ramifications of the court of appeals' contrary ruling sweep far beyond the airline industry.

2. In support of their policy arguments, respondents rely (Br. in Opp. 6-8) on a proposal drafted by the Department of Transportation that would make the regulations mandated by the court of appeals' decision applicable to all commercial air carriers. Respondents fail to acknowledge that the proposal has no legal status whatever; indeed, it does not even have the minimal status of proposed regulations. Instead, the proposal was transmitted to the Department of Justice with a request that it be approved for issuance as a Notice of Proposed Rulemaking. That request was denied on August 2, 1985, because the Department of Justice, acting pursuant to its Section 504 oversight authority under Executive Order No. 12,250, 3 C.F.R. 298 (1981) (see Pet. 13 n.10), concluded, as a legal matter, that the proposal was inconsistent with the program-specificity mandate of Section 504. In these circumstances, the proposal represents nothing more than inter-agency correspondence, and it simply has no relevance to the legal issues before this Court.

3. Respondents also make much of the fact that the CAB initially proposed to issue regulations applicable to all commercial air carriers (Br. in Opp. 3-5). Respondents find the Board's explanation for the narrower scope of the final rules—the impending "sunset" of the legal authority on which the Board had placed initial reliance—inadequate. But respondents choose to ignore the passage of time between issuance of the Board's proposed rules in 1979 and promulgation of the final rules in 1982. While it might have seemed reasonable in 1979 to issue regulations grounded in the legal authority of Section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. (1976 ed.) 1374(b), such a course of action would have been nonsensical in 1982, when Section 404(b) was slated to expire in six months. Moreover, respondents' position would make a mockery of the purpose of notice and comment rulemaking. The Board received a substantial number of comments on the proposed regulations (see Pet. App. 85a), and, after considering those comments, it was forced to reevaluate the jurisdictional basis for its proposal. That the Board's review of the comments received resulted in a final rule different in scope from the proposed rule hardly constitutes grounds for invalidating the final rule.

4. Respondents finally contend (Br. in Opp. 20) that there is no real conflict between the decision below and the Ninth Circuit's decision in *Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202 (1984). This is so, respondents argue, because compliance by the government with the decision below would establish a nationally uniform regulatory structure. Of course, the same could be said of any of the numerous decisions of the District of Columbia Circuit that have nationwide effect, but that factor has never been deemed sufficient to insulate those decisions from review by this Court. See, *e.g.*, *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, No. 84-312 (July 2, 1985). In any event, the fact

remains that a handicapped plaintiff in the Ninth Circuit would almost certainly lose any case alleging a violation by an airline of the regulations mandated by the court below, because *Jacobson* would require the Ninth Circuit to rule that the regulations are unauthorized by law. Moreover, *Jacobson* cannot be regarded as the dead letter that respondents would have the Court believe; its validity was expressly reaffirmed by the Ninth Circuit in *Hingson* v. *Pacific Southwest Airlines*, 743 F.2d 1408, 1414-1415 & n.8 (1984).[3] There is no escaping the fact that the two circuits are in conflict over the scope of "federal financial assistance" to airlines, and all interested parties—the government, the airlines, and handicapped travellers—are entitled to a definitive resolution from this Court.

For the foregoing reasons, as well as those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

[3] *Hingson* held that air carriers that do not receive federal subsidies for carrying the mail cannot be deemed recipients of federal financial assistance for purposes of Section 504. Although the forms of "assistance" relied upon by the court below—the use of federally-aided airports and the air traffic control system—were not discussed in *Hingson*, the court reached its decision in reliance on the CAB rules that the court below invalidated (743 F.2d at 1414 n.8). It is therefore clear that the Ninth Circuit would not accept the sweeping view of federal financial assistance espoused by the court below.

PETITIONER'S

BRIEF

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QUESTIONS PRESENTED

1. Whether federal financial assistance to airport operators renders Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, applicable to the on-board activities of airlines using federally-assisted airports.

2. Whether the federally-operated air traffic control system constitutes a form of federal financial assistance to airlines.

PARTIES TO THE PROCEEDING

In addition to the United States Department of Transportation, the respondents in the court of appeals included the Civil Aeronautics Board, the Federal Aviation Administration, and the Regional Airline Association. The CAB ceased operations on December 31, 1984, pursuant to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, and the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* See note 1, *infra*. The Department of Transportation assumed the CAB's functions under the Rehabilitation Act of 1973, and it is the petitioner in this Court, along with its constituent agency, the Federal Aviation Administration. Pursuant to Rule 19.6 of the Rules of this Court, the Regional Airline Association is a respondent in this Court.

In addition to Paralyzed Veterans of America, the petitioners in the court of appeals included the American Coalition of Citizens with Disabilities, Inc. and the American Council of the Blind. All three organizations are respondents in this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-76a) is reported at 752 F.2d 694. The opinion dissenting from the denial of rehearing en banc (Pet. App. 80a-83a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1985. A petition for rehearing was denied on April 26, 1985 (Pet. App. 77a). On July 13, 1985, Justice White extended the time for filing a petition for a writ of certiorari to and including August 26, 1985. The petition was filed on August

20, 1985, and granted on October 21, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, provides in pertinent part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

2. Regulations promulgated by the Civil Aeronautics Board to implement Section 504 of the Rehabilitation Act of 1973 were published at 47 Fed. Reg. 25936 *et seq.* (1982), as amended by 47 Fed. Reg. 51857 *et seq.* (1982), and codified at 14 C.F.R. Pt. 382. Because the issues in this case are limited to the question of the proper jurisdictional reach of the regulations and do not involve the details of the regulations themselves, only the preamble to the regulations (47 Fed. Reg. 25936-25939 (1982)), setting forth the Board's legal rationale for the scope of the regulations, is reproduced in the appendix to the petition (Pet. App. 84a-95a).

STATEMENT

Respondents, the Paralyzed Veterans of America and two other organizations representing disabled individuals brought this action under Section 1006 of the Federal Aviation Act, 49 U.S.C. (1976 ed.) 1486, seeking review of regulations issued by the

Civil Aeronautics Board to implement Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. Section 504 prohibits discrimination on the basis of handicap in "any program or activity receiving Federal financial assistance." In its final rulemaking, the Board determined, with the approval of the Department of Justice, that only those airlines receiving a subsidy from the Board under Section 406(b) or Section 419(a)(4) and (b)(5) of the Federal Aviation Act, 49 U.S.C. (1976 ed. Supp. V) 1376(b) and 1389(a)(4) and (b)(5), were federally assisted within the meaning of Section 504.

The court of appeals disagreed, holding that the commercial aviation activities of all certificated airlines constitute federally assisted programs or activities because the airlines have the use of federally assisted airports. In addition, the court of appeals was of the view that the federally operated air traffic control system constitutes federal financial assistance to the commercial aviation activities of all airlines. Accordingly, the court vacated the Board's regulations insofar as they were limited in their application to carriers receiving subsidies under Sections 406 or 419 of the Federal Aviation Act and instructed the CAB's successor agency, the Department of Transportation, to promulgate new regulations applicable to all commercial airlines.[1]

---

[1] The CAB ceased operations on December 31, 1984. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*; Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* Section 3(e) of the Sunset Act (98 Stat. 1704) devolved all remaining authority of the CAB on the Department of Transportation, unless otherwise provided. Section 12(a) of the Sunset Act (98 Stat. 1710) preserved all CAB rules and regulations in effect at the time of transfer.

A. The History Of The CAB's Regulations.

1. Prior to the "sunset" of the CAB, federal regulation of aviation was divided between the CAB and the Federal Aviation Administration.[2] The FAA was and is responsible for operating the air traffic control system and ensuring the safety of airline operations. See *Air Line Pilots Ass'n* v. *CAB*, 667 F.2d 181 (D.C. Cir. 1981). In addition, the FAA has, since 1946, granted federal financial assistance to airport operators (typically, municipalities or other units of local government) for the construction and improvement of terminals, runways, and airport safety equipment.[3]

The CAB, on the other hand, was responsible for the economic regulation of the airline industry. In that capacity, the Board regulated airline routes, fares, and service under the authority of the Federal Aviation Act of 1958, 49 U.S.C. (1976 ed. & Supp. V) 1301 *et seq.* Of particular relevance to this case was the Board's administration of subsidies to a few airlines pursuant to Sections 406(b) and 419(a)(4) and (b)(5) of the Federal Aviation Act, 49 U.S.C. (1976 ed. Supp. V) 1376(b) and 1389(a)(4) and (b)(5). Until 1978, Section 406 was the Board's only subsidy program. Designed to guarantee air service necessary to transport the mail to small communities, the original statutory scheme provided that the Postmaster General was to pay the airlines for the basic cost of transporting mail, while the Board was to pay the airlines additional amounts as subsidies if necessary to ensure the carriage of mail. See Section 406(b) and (c), 49 U.S.C. (1976 ed. Supp. V) 1376(b) and (c). The Section 406 program was sharply curtailed in 1978, and it was terminated entirely at the end of fiscal year 1982. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 24, 92 Stat. 1725; Act of Oct. 2, 1982, Pub. L. No. 97-276, § 130, 96 Stat. 1196-1197; Dep't of Transportation and Related Agencies Appropriations Act, 1983, Pub. L. No. 97-369, Tit. II, 96 Stat. 1778-1779.

Also in 1978, the CAB began operating the "Section 419 program," in order to subsidize "small community" and other essential air service that would not otherwise be provided. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 33, 92 Stat. 1732. This program, which is to operate through 1988, is unrelated to the provision of mail service under Section 406.

2. In 1964, Congress passed Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, prohibiting discrimination on the basis of race, color, or national origin in federally assisted programs or activities.[4] Both aviation agencies, the CAB and the FAA,

[2] The FAA became a component of the Department of Transportation by virtue of Section 3(e)(1) of the Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 932, recodified at 49 U.S.C. 106.

[3] See the Federal Airport Act, ch. 251, 60 Stat. 170 *et seq.*; the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 *et seq.*; and the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201 *et seq.*

[4] Title VI is widely recognized as the congressional model for subsequently-enacted statutes prohibiting discrimination in federally assisted programs or activities, and case law interpreting Title VI is generally applicable to issues arising under the later-enacted statutes, including the Rehabilitation Act. See *Grove City College* v. *Bell*, 465 U.S. 555, 566 (1984); S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974); Pet. App. 29a-30a & nn. 86-88. Accordingly, regulations issued by the FAA and the CAB to implement Title VI form the critical

published regulations implementing Title VI on December 31, 1964. The only federally assisted grant program administered by the Board at that time was the Section 406 mail subsidy program, and the Board's initial Title VI regulations, while leaving open the possibility of Title VI coverage for unspecified, future programs, expressly applied only to the activities of airlines receiving payments under the Section 406 program (14 C.F.R. 379.2 (1965), 29 Fed. Reg. 19287 (1964)):

> This part applies to any program for which Federal financial assistance is authorized under a law administered by the Board, including the payment of compensation by the Board under section 406 of the Federal Aviation Act of 1958 (49 U.S.C. 1376).[5]

After 1978, the Board modified its Title VI regulations to include its only other subsidy program, the newly-enacted Section 419 program. 14 C.F.R. 379.2, 379.3, 379.4, and 379.12, 44 Fed. Reg. 42175-42176 (1979).

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backdrop for consideration of the Board's Section 504 regulations.

[5] See also 14 C.F.R. 379.3(b) (1965), 29 Fed. Reg. 19287 (1964):

> *Specific discriminatory actions prohibited.* No air carrier shall subject any person to discrimination on the ground of race, color, or national origin in connection with any air transportation for which such carrier is receiving or has claimed compensation payable by the Board under section 406 of the Federal Aviation Act of 1958.

Similarly, the only definition the Board specified for the term "Federal financial assistance" was "grants of Federal funds under section 406 of the Federal Aviation Act of 1958." 14 C.F.R. 379.12 (1965), 29 Fed. Reg. 19289 (1964).

Meanwhile, the FAA, based on its administration of grants to airport operators, proscribed discriminatory treatment by airport operators and by lessees of airport operators who furnished services *at* the airport; the illustrative examples given in the FAA's Title VI regulations make it clear that its regulatory authority extended to the threshold of the planes but no farther.[6] When the FAA became a part of the Department of Transportation (see note 2, *supra*), its Title VI regulations were subsumed within DOT's own Title VI regulations (35 Fed. Reg. 10080 *et seq.* (1970)). DOT's regulations contained equivalent illustrative examples that, if anything, made it even clearer that the regulatory jurisdiction conferred by virtue of federal financial assistance to airport operators extended to services provided *at* the airport, but not to the interior of aircraft.[7] Indeed, DOT's regu-

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[6] The FAA's original Title VI regulations provided (14 C.F.R. 15.5(c) (1965), 29 Fed. Reg. 19283 (1964)):

> *Examples.* The following examples illustrate the application of the non-discrimination provisions of Title VI of the Civil Rights Act and this part:
>
> (1) The operator of an airport who is the recipient of Federal financial assistance must give assurance that an entrepreneur who rents space at the airport and there operates a restaurant will not in any manner discriminate between patrons for reasons of race, color, or national origin.
>
> (2) The operator of an airport who is the recipient of Federal financial assistance is bound by the conditions and covenants in the conveyance that prohibit, among other things, discrimination for reason of color, race, or national origin in admission of the public to waiting rooms, sightseeing areas, sanitary facilities, and any other facilities under the control of the airport operator himself.

[7] Appendix C to DOT's Title VI regulations gave the following examples of FAA programs subject to regulation (49

lations prohibited airport administrators from discriminating *against* aircraft operators because of the race of the pilot (49 C.F.R. Pt. 21, App. C(a)(1)(iii), (iv) and (v) (1971), set forth at note 7, *supra*). Significantly, however, the lengthy list of examples made no mention of passengers *in* airplanes; the only provisions for passengers related to the use of

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C.F.R. Pt. 21, App. C(a)(1) (1971), 35 Fed. Reg. 10085 (1970)):

Federal Aviation Administration. (i) The airport sponsor or any of his lessees, concessionaires, or contractors may not differentiate between members of the public because of race, color, or national origin in furnishing, or admitting to, waiting rooms, passenger holding areas, aircraft tiedown areas, restaurant facilities, restrooms, or facilities operated under the compatible land use concept.

(ii) The airport sponsor and any of his lessees, concessionaires, or contractors must offer to all members of the public the same degree and type of service without regard to race, color, or national origin. This rule applies to fixed base operators, restaurants, snack bars, gift shops, ticket counters, baggage handlers, car rental agencies, limousines, and taxis franchised by the airport sponsor, insurance underwriters, and other businesses catering to the public at the airport.

(iii) An aircraft operator may not be required to park his aircraft at a location that is less protected, or less accessible from the terminal facilties, than locations offered to others, because of his race, color, or national origin.

(iv) The pilot of an aircraft may not be required to help more extensively in fueling operations, and may not be offered less incidental service (such as windshield wiping), than other pilots, because of his race, color, or national origin.

(v) No pilot or crewmember eligible for access to a pilot's lounge or to unofficial communication facilities such

facilities *at* the airport and the use of *ground* transportation to leave the airport (49 C.F.R. Pt. 21, App. C(a)(1)(vi) and (vii) (1971), set forth at note 7, *supra*).

In sum, the regulatory agencies recognized from the very outset that Title VI did not reach the on-board activities of commercial airlines, except for those few airlines that received subsidies from the CAB.[8]

3. Using their Title VI regulations as a model, DOT and the Board divided regulatory jurisdiction under Section 504 in the same fashion, with DOT taking responsibility for regulations covering activities *at* airports and the Board assuming responsibility

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as a UNICOM frequency may be restricted in that access because of his race, color, or national origin.

(vi) Access to facilities maintained at the airport by air carriers or commercial operators for holders of first-class transportation tickets or frequent users of the carrier's or operator's services may not be restricted on the basis of race, color, or national origin.

(vii) Passengers and crewmembers seeking ground transportation from the airport may not be assigned to different vehicles, or delayed or embarrassed in assignment to vehicles, by the airport sponsor or his lessees, concessionaires, or contractors, because of race, color, or national origin.

[8] Although Title VI was never construed to reach the on-board activities of nonsubsidized air carriers, courts had early interpreted the general "antidiscrimination" clause of Section 404(b) of the Federal Aviation Act, 49 U.S.C. (1976 ed.) 1374(b), to prohibit racial discrimination by all air carriers. See *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956); *United States* v. *City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962). As described at pages 11-12, *infra*, however, Section 404(b) "lapsed" on January 1, 1983, as part of the phase-out of the CAB.

only for the on-board activities of the airlines. Initially, however, both agencies expected the CAB to be able to promulgate regulations governing the on-board activities of *all* certificated airlines, using authority derived from the Federal Aviation Act to supplement its more limited authority under Section 504. Thus, on June 6, 1979, the CAB published a Notice of Proposed Rulemaking in which it announced its intention to promulgate regulations "to prohibit unlawful discrimination against disabled travelers *and* to implement section 504 of the Rehabilitation Act of 1973." 44 Fed. Reg. 32401 (emphasis added). The Board's notice made clear its position that its jurisdiction under Section 504 was limited to those few carriers to which the Board extended federal subsidies. 44 Fed. Reg. 32402 (1979).[9] For that reason,

[9] That this was the Board's view is demonstrated by its explanation for deciding not to regulate the employment practices of the airlines (44 Fed. Reg. 32402 (1979) (emphasis added)):

> In accordance with the Airline Deregulation Act of 1978, the Board will be phasing out its operations over the next 6 years. * * * Under the circumstances, it would be very difficult to develop a new program in an area where we have little experience or background, and then to allocate and train staff to implement it. *This use of resources would be particularly unwise because the benefits that would flow from Board regulation of employment would be small. The Board extends direct Federal subsidies only to a small number of air carriers, so that the reach of our section 504 jurisdiction would not have a significant effect on industry employment. While we can prevent discrimination in air transportation under section 404 of the Federal Aviation Act without clear section 504 jurisdiction, the same is not true of employment. The Board would have no authority to regulate employment practices of unsubsidized carriers unless those practices somehow caused discrimination in transportation.*

the Board proposed to prohibit all carriers from discriminating against handicapped air travellers not in reliance on Section 504, but instead based on its authority under Section 404 of the Federal Aviation Act, 49 U.S.C. (1976 ed. & Supp. V) 1374. As the Board explained (44 Fed. Reg. 32401-32402 (1979) (emphasis added)):

> [The proposed rules] would implement section 504 * * *, which prohibits discrimination against the handicapped in any program or activity receiving Federal financial assistance. *In addition, the proposed rules would emphasize that the handicapped are protected by the adequacy of service and antidiscrimination provisions of section 404 of the Federal Aviation Act * * *, which are applicable to all air carriers, whether or not receiving Federal financial assistance.*

Section 404 of the Federal Aviation Act, 49 U.S.C. (1976 ed. & Supp. V) 1374, as it existed at the time of the Board's Notice of Proposed Rulemaking, contained two provisions relevant to this case. Section 404(a)(1), 49 U.S.C. (1976 ed. Supp. V) 1374(a)(1), contained a "safe and adequate service" requirement, obligating all air carriers to "provide safe and adequate service, equipment, and facilities in connection with [interstate and overseas air] transportation." Section 404(b), 49 U.S.C. (1976 ed.) 1374(b), contained a general "antidiscrimination" clause, prohibiting any carrier from "subjecting any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

As set forth above, the Board was of the view that the "safe and adequate service" and "antidiscrimina-

tion" provisions of Section 404, taken together, gave the Board sufficient authority to require all carriers to comply with regulations prohibiting discrimination against handicapped air travellers, whether or not a particular carrier was receiving federal financial assistance. Pursuant to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40(a), 92 Stat. 1744 (codified at 49 U.S.C. 1551(a)(2)(B)), however, the "antidiscrimination" clause of Section 404(b) lapsed as of January 1, 1983; only the "safe and adequate service" requirement of Section 404(a), 49 U.S.C. (1976 ed. & Supp. V) 1374(a), remains in effect.

This contraction of the Board's statutory authority required it to reevaluate its jurisdiction to impose the proposed regulations on all carriers. After studying the numerous comments received and consulting with the Department of Justice,[10] the Board concluded that the "safe and adequate service" clause of Section 404(a) might support a general prohibition against discrimination on the basis of handicap applicable to all carriers, but that it was too slender a reed to justify the imposition of more specific regulations applicable to the on-board activities of nonsubsidized carriers. 47 Fed. Reg. 25937-25938 (1982) (Pet. App. 85a-91a).[11] In reaching this conclusion, the

[10] Pursuant to Executive Order No. 12,250, 3 C.F.R. 298 (1981), the Attorney General was directed to coordinate the implementation and enforcement by Executive agencies of the nondiscrimination provisions contained in a number of civil rights statutes, including Section 504 of the Rehabilitation Act. Previously, this coordinating function had been exercised by the Secretary of Health, Education, and Welfare (see Executive Order No. 11,914, 3 C.F.R. 117-118 (1977)) and, later, by the Secretary of Health and Human Services.

[11] Whether the Board's conclusion that the "safe and adequate service" clause of Section 404(a) could be interpreted

Board carefully considered, but ultimately rejected, the contention that all certificated carriers receive federal financial assistance within the meaning of Section 504 by virtue of their use of the federally operated air traffic control system and federally assisted airports. 47 Fed. Reg. 25937 (1982) (Pet. App. 88a). Accordingly, the Board concluded that the on-board activities of only those airlines receiving subsidies from the Board could be regulated under Section 504. 47 Fed. Reg. 25937-25938 (1982) (Pet. App. 85a-91a).

The final regulations promulgated by the Board (14 C.F.R. Pt. 382, 47 Fed. Reg. 25948 *et seq.* (1982)) contain three subparts. Subpart A is a general prohibition against discrimination in air transportation against qualified handicapped persons. Subpart B of the Board's final rules sets forth specific requirements to be followed by each regulated carrier in providing air transport service to the handicapped.[12] Subpart C establishes compliance and enforcement mechanisms. By virtue of the "safe and adequate service" provision of Section 404(a) of the Federal Aviation Act, the Subpart A regulations apply to all certificated carriers, whether they receive federal financial assistance or not. In recognition of the limited jurisdictional

as encompassing a general ban on discrimination was correct, and, if so, whether the Board could have construed that same clause more broadly to impose specific antidiscrimination regulations on all carriers, are interesting legal questions, but they are not before this Court. Instead, this case is limited to the scope of coverage under Section 504.

[12] Subpart B deals with such matters as the availability of information for deaf persons, guide dogs, wheelchairs, special lifts to help handicapped passengers board and deplane, and the carrying of medically-needed oxygen on board the aircraft.

reach of Section 504, however, Subparts B and C of the final regulations apply only to those carriers receiving federal subsidies under Sections 406 or 419 of the Federal Aviation Act.[13] The Attorney General approved the CAB's final regulations (see note 10, *supra*).

B. The Court Of Appeals' Decision.

After setting forth the history of the rulemaking, the court of appeals turned to respondents' contention that all commercial airlines are subject to Section 504. The court first rejected respondents' arguments that operating certificates and preferential tax treatment for airlines constitute "Federal financial assistance" to airlines within the meaning of Section 504.[14] The court next considered respondents' contention that the federally operated air traffic control system constitutes federal financial assistance to airlines and con-

[13] The Board did, however, urge nonsubsidized carriers to look to Subpart B of the Section 504 regulations for guidance in complying with the general antidiscrimination provision of Subpart A applicable by virtue of Section 404(a) alone. 47 Fed. Reg. 25938 (1982) (Pet. App. 90a-91a).

[14] With respect to operating certificates, the court endorsed the CAB's reliance (Pet. App. 88a) on *Gottfried* v. *FCC*, 655 F.2d 297 (D.C. Cir. 1981), in which the court had held that broadcast licenses issued by the FCC do not constitute federal financial assistance for purposes of Section 504 (Pet. App. 34a). With respect to tax credits, the court of appeals doubted that "Congress * * * intend[ed], by granting a limited tax incentive to a particular industry or group, to thereby encompass every such individual or group, or, for that matter, individual within some ever-widening and potentially almost limitless definition of 'federal financial assistance.'" *Id.* at 37a. The court also expressed the view that it would be anomalous to allow the airlines themselves to determine whether they wished to comply with Section 504 simply by deciding whether or not to take advantage of tax credits (Pet. App. 37a-38a).

cluded that it does (Pet. App. 39a-40a, 43a (footnotes omitted)):

> It cannot be seriously disputed that the safe and efficient operation of commercial air transportation depends in great measure (if not, as [respondents] assert, "entirely") upon "the proper functioning of the national air traffic control system." * * * Moreover, this crucial assistance may reasonably be considered "financial." * * * Consequently, [respondents'] argument that the federal air traffic control system is an "arrangement" that "provides or otherwise makes available assistance in the form of . . . services of Federal personnel" leads reasonably to the conclusion that the system does indeed constitute federal financial assistance to all commercial air carriers. It follows, therefore, that any and all carriers making use of the federal air traffic control system should be subject to any regulations promulgated under section 504.
>
> * * * * *
>
> The fact is that the air traffic control system is *indispensable* to the *very existence* of modern commercial aviation, and that if it were not provided by the federal program now in place, it would have to be provided, and paid for, by the airlines themselves.

Despite the court's conclusion that the air traffic control system constitutes federal financial assistance to all commercial airlines, the court declined to invalidate the Board's rules on that basis, apparently because it found itself unable to define the "program or activity" that is federally assisted by the air traffic control system. Taking note of this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), the court observed that if the assisted "program or

activity" were deemed to be the federal air traffic control system, then "only that particular system—its personnel practices and physical facilities, for example—could be regulated under section 504" (Pet. App. 45a). On the other hand, the court reasoned that, if the assisted "program or activity" were deemed to be that of "commercial air transportation as engaged in by the air carriers," then *Grove City*'s program-specific mandate would not be violated by applying Section 504 to the on-board activities of all commercial airlines (Pet. App. 45a).

The court then concluded that it need not resolve the "program or activity" question in the context of the air traffic control system. Instead, the court reasoned that the CAB "erred as a matter of law in failing to apply its section 504 regulations to all commercial air carriers" because of the federal government's funding of airports and airways *used* by those carriers. Pet. App. 45a. The court stated (*id.* at 50a-51a (footnotes omitted)):

> Airports and airlines are inextricably intertwined. The indissoluble nexus between them is the provision of commercial air transportation. Although airports may lease space to gift shops and airlines may publish in-flight magazines or own a chain of resort hotels, when it comes to the "program or activity" of providing air transportation to the traveling public, the two entities are so functionally integrated that they become one. While it *may* be the case * * * that the *airline* as a corporate entity does not become a federally-assisted "program" by virtue of its use of federally-assisted airports, its "program or activity" of providing commercial air transportation certainly does.

Accordingly, the court vacated the CAB's regulations insofar as they failed to apply to all commercial airlines and remanded the regulations to the Department of Transportation (the CAB's successor) for repromulgation in accordance with its opinion.[15]

The government's petition for rehearing and suggestion that rehearing be en banc were denied. Judges Bork, Scalia, and Starr dissented from the denial of rehearing en banc. In an opinion written by Judge Bork, the dissenters expressed the view that the panel's decision could not be squared with this Court's decisions in *Grove City* and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (Pet. App. 82a-83a (footnote omitted)):

> Under *Grove City*, the airlines here are clearly not "recipients" of federal funds. The airports are, and the ground activities of the airlines integral to the operation of the airport may be, subject to section 504. However, the non-airport activities of the airlines, such as in-flight procedures, are outside the scope of that section.
>
> The panel's attempts to distinguish this case from *Grove City* are wholly unpersuasive. * * * The Supreme Court has been over this ground, and we ought to accept, rather than evade, its conclusion.

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[15] Respondents also challenged two specific aspects of the Board's final regulations—the Board's definition of "qualified handicapped person" and a requirement that handicapped persons who require "extensive special assistance" notify the airlines 48 hours in advance of flight. These challenges were resolved in the Board's favor (Pet. App. 62a-72a), and respondents did not seek further review.

SUMMARY OF ARGUMENT

I. A. The court of appeals' decision that the on-board activities of all commercial airlines, by virtue of the airlines' use of federally assisted airports, are subject to regulation under Section 504 completely ignores the distinction between a "recipient" operating a federally assisted "program or activity" and an entity that "participates in," or receives the benefits of, a federally assisted program. The two are not the same. Section 504 prohibits those who receive federal financial assistance—*i.e.*, *recipients*—from discriminating in the conduct of assisted programs against, inter alia, the intended *beneficiaries* of that assistance. Importantly, however, Congress never intended to regulate beneficiaries who do not themselves, either directly or indirectly, receive federal funding. Maintenance of the distinction between a "recipient" operating a federally assisted "program or activity" and a "beneficiary" of that assistance is essential if Congress's expressed intent to impose some limits on the reach of the statute is to be respected.

In the context of this case, only airport operators are "recipients" of federal funds extended under the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201 *et seq.* Those who *use* airports—the airlines, businesses requiring air travel, and members of the travelling public—are merely the *beneficiaries* of federal grants to airport operators. These beneficiaries are *not* subject to regulation under Section 504.

The contrary conclusion of the court of appeals leads to absurd results and, as recognized by the dissenting opinion below (Pet. App. 80a-81a), admits of no limiting principle. The "indissoluble nexus" between airports and airlines created by the court of

appeals (Pet. App. 50a) would apply with equal force to all those who rely on air travel in the conduct of their business or for personal convenience. Clearly, Congress did not intend to transform all such entities or persons into "recipients" of federal financial assistance. It is therefore of no consequence that the airlines arguably benefit more directly from the use of federally assisted airports than other users.

The error of the court of appeals is also apparent in its failure to note the element of choice inherent in Section 504 and the statutes on which it is modeled. Had it so desired, Congress could have made it unlawful for all businesses engaged in interstate commerce to discriminate against the handicapped, whether or not those businesses received federal funding. Instead, however, Congress made regulation under Section 504 a matter of choice, by tying regulatory coverage to the voluntary receipt of federal financial assistance. See, *e.g.*, *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 633 n.13 (1984). As a practical matter, however, the "indissoluble nexus" (Pet. App. 50a) that the court of appeals used to bind airports and airlines makes it impossible for the airlines to "opt out" of the federally assisted program into which the court has thrust them. The airlines, of course, have no control over an airport operator's decision to accept or reject federal financial assistance. Although the airlines could, in theory, choose to go out of business, it is inconceivable that Congress meant to put them to the choice of involuntary acceptance of federal aid or termination of commercial aviation throughout the nation. Section 504 should not be interpreted to produce such an anomalous result.

B. The court of appeals' disregard of the "program specificity" limitation inherent in Section 504 cannot be squared with this Court's decisions in *Grove City College* v. *Bell*, 465 U.S. 555 (1984); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982). In this case, the court of appeals effectively invented its own "program or activity" of "providing commercial air transportation" (Pet. App. 50a) and then held that all of the constituent parts of that fictional "program or activity" are covered by Section 504. The problem with the court of appeals' approach is that there is no federally assisted "program or activity" of "providing commercial air transportation," any more than there is a federally assisted "program or activity" of "providing post-secondary education." Instead, the court of appeals should have recognized, as this Court held in *Grove City*, that the boundaries of a federally assisted program or activity are defined by the underlying grant statute. Just as tuition grants assist only a college's financial aid program (*Grove City*, 465 U.S. at 573), so too, grants under the Airport and Airway Improvement Act assist only airport operators in running an airport. Those grants furnish no assistance whatever to the airlines' "program or activity" of transporting people from one place to another. Simply stated, until Congress provides federal financial assistance for *flying*, there can be no assisted "program or activity" that embraces the on-board activities of nonsubsidized airlines.

II. The court of appeals also erred in its conclusion that the federal air traffic control system constitutes federal financial assistance to the airlines. The legislative history of Title VI, on which Section 504 is modeled, makes it clear that federally *conducted* programs—that is, programs funded solely by federal money—have *only* beneficiaries; there are no intermediate "recipients" subject to regulation. See 110 Cong. Rec. 13380 (1964) (letter from Deputy Attorney General Katzenbach). This is so because programs like the air traffic control system fall into the general category of "public goods"—goods and services from which all citizens and businesses benefit. Arguably, this public benefit may "assist" airlines more directly than it assists other enterprises that use the airlines or fly private planes in the course of their business. It also protects those on the ground from plane crashes. It does not, however, constitute "Federal financial assistance" to anyone.

The court of appeals was able to reach a contrary conclusion only by distorting a consistent administrative interpretation of "Federal financial assistance" that dates back to 1964. The FAA's original Title VI regulations included the "*detail*" of Federal personnel" as an example of "Federal financial assistance." 14 C.F.R. 15.23(3) (1965) (emphasis added). Clearly, the operation of the air traffic control system does not involve the "detail" of any federal personnel to the airlines. In 1978, however, the Department of Health, Education and Welfare substituted the word "services" for "detail," so that federal financial assistance under Section 504 included the "[*s*]*ervices* of Federal personnel." 43 Fed. Reg. 2137 (1978) (emphasis added). But the regulatory history demonstrates that no substantive change was intended, and thus the "services of Federal personnel" should be interpreted in the same manner as the "detail of Federal personnel." So construed, it is clear that the federally operated air traffic control system does not constitute federal financial assistance to the airlines.

ARGUMENT

I. FEDERAL FINANCIAL ASSISTANCE TO AIRPORT OPERATORS DOES NOT RENDER THE ON-BOARD ACTIVITIES OF NONSUBSIDIZED AIRLINES SUBJECT TO SECTION 504

A. Nonsubsidized Airlines Are Not Recipients Of Federal Financial Assistance For The Conduct Of In-Flight Activities.

1. The court of appeals' conclusion that commercial airlines, by virtue of their use of federally assisted airports, become "recipients" of federal financial assistance in the conduct of their on-board activities totally obliterates any distinction between a "recipient" operating a federally assisted "program or activity" and an entity that "participates in," or receives the benefits of, a federally assisted program. The two are not the same. Section 504, like other similarly-worded statutes, prohibits those who receive federal financial assistance—*i.e., recipients*—from discriminating in the conduct of their assisted programs against, inter alia, the intended *beneficiaries* of that assistance.[16] Importantly, however, Congress did not intend to regulate the intended beneficiaries of the federal funding. See *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Table) (a recipient under Title VI "is the intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve. * * * The requirements of Title VI cover recipients but not beneficiaries.").

[16] Employees are protected by Section 504 from discrimination in federally assisted programs because they "participate in" such programs (see *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984)), but they are not necessarily "beneficiaries." In any event, the issue of Section 504's applicability to the employees of entities that conduct federally assisted programs is not involved in this case.

Similarly, federal tuition grants assist the financial aid program of a college and subject that program to government regulation. *Grove City College* v. *Bell*, 465 U.S. 555 (1984). Students receiving federal scholarships (or on whose behalf a college receives scholarship money) are not, on the other hand, "recipients" subject to governmental regulation; instead, they are beneficiaries entitled to governmental protection against discrimination by "recipients" in federally assisted programs.

Under this scheme, airport operators clearly are "recipients" of funds extended under the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201 *et seq.*, and its predecessor statutes (see note 3, *supra*). This is so not merely because the airport operators literally "receive" federal grants, but also because they are not the intended ultimate beneficiaries of the federal assistance. The beneficiaries of federal grants to airport operators are those who *use* airports to enhance their commercial enterprises or personal convenience. Thus, airlines, businesses requiring air travel, and individuals all are beneficiaries of, or participants in, the program receiving federal aid. See Section 502(a)(2) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201(a)(2) (purpose of Act is to meet the needs of aviation, interstate commerce, the Postal Service, and the national defense).

Judge Bork, in his opinion dissenting from the denial of rehearing en banc, recognized the clear import

of the court of appeals' failure to distinguish between "recipients" and "participants" or "beneficiaries" (Pet. App. 80a-81a):

> [The panel's] reading of section 504's statutory language would make every commercial enterprise a "recipient" of federal aid when it merely makes use of a service or facility that receives any federal assistance. That idea has great potential. Trucking and bus companies use federally constructed and maintained highways, and their businesses are thus inextricably intertwined with a federally assisted program. Many electric companies rely on dams constructed and maintained with federal funds. Without the National Weather Service farmers would be unable to plan, protect, and cultivate their crops in an effective manner. It ought surely to be true that federal funding of federal courts results in the regulation of law firms since courts are inextricably intertwined with and indispensable to lawyering.

There is no merit, therefore, to the court of appeals' rationale that an "indissoluble nexus" (Pet. App. 50a) between airports and airlines transforms all of the airlines' activities, including those discrete activities that take place inside the aircraft, into federally assisted programs or activities. Virtually the same argument would apply with equal force to all businesses that rely on air travel to sell goods and services in a nationwide market. Most if not all of the Nation's major corporations require extensive air travel by their personnel. Under the court of appeals' reasoning, all of those businesses, like the airlines, would be transformed into "recipients" of federal financial assistance. Yet Congress clearly did not intend that all those who rely on air travel be

deemed "recipients" of federal financial assistance to airports.

The lower courts have in fact recognized the distinction between "recipients" of federal financial assistance and "participants" in or "beneficiaries" of federally assisted programs. See, *e.g.*, *Disabled in Action* v. *Mayor & City Council*, 685 F.2d 881 (4th Cir. 1982). There, the court of appeals rejected the notion that the Baltimore Orioles' use of a federally assisted municipal stadium transformed the team into a "recipient" of federal financial assistance. The court stated (685 F.2d at 884-885 (emphasis added)):

> At the very least, it is plain that the City is no mere conduit of federal assistance to the Club. Here, * * * the benefits of federal assistance have accrued both to the direct recipient (* * * the City) and to another entity (* * * the Club) which shares in those benefits by virtue of business dealings with the direct recipient. *If the Rehabilitation Act extends to such indirect beneficiaries of federal largesse, consistency would demand that it apply to every customer of every enterprise subsidized by the federal government. Nothing in the language or legislative history of the Act indicates a congressional intention to reach so far.*

Disabled in Action, as well as the dissenting opinion below, thus clearly demonstrate that the court of appeals erred in concluding that nonsubsidized airlines, insofar as their on-board activities are concerned, are anything other than "beneficiaries" of or "participants" in the program or activity conducted by airport operators. To expand the scope of Section 504 to reach the airlines' on-board activities would be

to embrace a concept that is incapable of principled limitation and bears no relationship to the statute Congress actually enacted.

2. The failure of the court of appeals to distinguish between "recipients" subject to regulation and participants or beneficiaries entitled to governmental protection is most apparent in its facile assumption that one can label as a "recipient" of federal financial assistance the person or entity most in need of, or who benefits the most from, that assistance. See, *e.g.*, Pet. App. 43a (footnote omitted) ("The fact is that the air traffic control system is *indispensable* to the *very existence* of modern commercial aviation, and * * * if it were not provided by the federal program now in place, it would have to be provided, and paid for, by the airlines themselves.").

In fact, it should be obvious that, in general, the person or entity most in need of or benefiting the most from federal financial assistance normally is *not* the recipient, but the beneficiary. Recipients such as state agencies, for example, do not "need" Aid to Families with Dependent Children (AFDC) or food stamps. But it certainly does not follow that those who benefit *most*—AFDC families—are the "recipients" Congress intended to regulate. See *Bob Jones University*, 396 F. Supp. at 601 n.15.

Nor does it advance the analysis to use such words as "indissoluble" or "inextricable" to describe the relationship between recipients and beneficiaries (Pet. App. 50a). No matter how indispensable a federally sponsored scholarship may be to a student's college education, the student remains a beneficiary of that aid, not a recipient subject to federal regulation. It is thus totally irrelevant to the issue in this case that

airlines may benefit more directly from the use of federally assisted airports than members of the travelling public or other businesses that are dependent on commercial aviation for their profitability.[17]

[17] In *Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202, 1213 (9th Cir. 1984), cert. dismissed, No. 84-1409 (Apr. 27, 1985), the court of appeals, considering arguments remarkably similar to those advanced by respondents in this case, found it unnecessary to decide "whether a person [or entity] can become subject to the Rehabilitation Act by benefiting to a substantially greater degree than the general public from services provided primarily for the general public." Instead, the court concluded that neither the use of federally assisted airports nor the air traffic control system constitutes federal financial assistance to airlines within the meaning of Section 504 because the airlines pay for those services through taxes imposed on aviation fuel, airplane tires and tubes, and other aviation products (742 F.2d at 1213-1214).

Although the Ninth Circuit reached the correct result when it held that the airlines are not "assisted," its rationale was flawed. Nothing in the legislative history of Title VI or Section 504 suggests that Congress considered the relationship between specific taxes or taxpayers and federal grants as relevant to the legislative scheme. Moreover, the Ninth Circuit's "user fee" premise was incorrect. In fact, commercial airlines do not make special payments for the services they use. (We note in this regard that the federal government was not a party in *Jacobson*, and thus the court may not have been fully informed with respect to the operation of the airport trust fund used to finance grants to airport operators.) We are advised by the Department of Transportation that the vast majority of contributions to the airport trust fund—87% in fiscal year 1985—is derived from an 8% tax on airline tickets (see 26 U.S.C. 4261) that, by statute, must be paid by passengers (26 U.S.C. 4261(d)). The remainder of moneys in the trust fund comes from taxes on cargo and general aviation fuel. The air traffic control system, on the other hand, is financed through general tax revenues.

Accordingly, we do not urge the Court to endorse the Ninth Circuit's *Jacobson* rationale. As demonstrated in text, how-

3. The decision below is also in error because it ignores the fact that Section 504, like the statutes on which it is modeled, applies only to entities that elect to receive federal financial assistance in the conduct of their programs and activities. As was the case with the enactment of Title VI, Congress's predominant concern in enacting Section 504 was to ensure that federal funds not be used to assist programs or activities that engage in discrimination. See, *e.g.*, 110 Cong. Reg. 6562 (1964) (remarks of Sen. Kuchel) (A recipient ought not to receive federal aid "if it is dedicated to use it in an unconstitutional manner."). In this respect, Section 504 is markedly different from other statutes that apply automatically to businesses engaged in interstate commerce, whether or not they receive federal funding. See, *e.g.*, Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Moreover, the element of choice inherent in the language employed by Congress in Section 504 is not accidental. Rather, as this Court recognized in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 633 n.13 (1984):

> Congress chose to ban employment discrimination against the handicapped, not by all employers, but only by the Federal Government and recipients of federal contracts and grants. As to the latter, Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.

See also *Grove City*, 465 U.S. at 565 n.13 (colleges "remain free to opt out of federal student assistance

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ever, the same result should obtain in this case, albeit for different reasons.

programs"); *id.* at 575 ("Grove City may terminate its participation in the [student assistance] program and thus avoid the requirements of [Title IX]"); 110 Cong. Rec. 6562 (1964) (remarks of Sen. Kuchel) (requirements of Title VI are voluntarily assumed by the decision to accept federal aid).

As a practical matter, the "indissoluble nexus" (Pet. App. 50a) that the court of appeals used to bind airports and airlines makes it impossible for the airlines to "opt out" of the federally assisted program into which the court has thrust them. The only "choice" available to the airlines would be to go out of business, because they cannot control the airport operators' decisions to accept or reject federal financial assistance. In the face of a grant statute intended to meet the needs of aviation, interstate commerce, the Postal Service, and the national defense (see page 23, *supra*), however, it strains credulity to suppose that Congress intended to limit the airlines' choices to the involuntary acceptance of federal financial assistance or the termination of commercial aviation throughout the nation. In essence, the court of appeals has rewritten Section 504 to make coverage mandatory for all businesses that have no choice but to use federally assisted airports. If the reach of the statute is to be so extended, that is a decision for Congress to make.

B. The Court Of Appeals' Decision In This Case Is Inconsistent With The "Program Specificity" Requirement Established In *Grove City College* v. *Bell*.

1. In deciding that the "program or activity" that is federally assisted in this case is the "provi[sion of] commercial air transportation" by all certificated carriers (Pet. App. 50a), the court of appeals seriously misapplied this Court's decision in *Grove City*.

There, the Court reaffirmed the doctrine that where a statute prohibits discrimination in a "program or activity" receiving "Federal financial assistance," the reach of the statute is "program specific." See also *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. at 635-636; and *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 539-540 (1982). In this case, however, the court of appeals effectively invented its own "program or activity" of "providing commercial air transportation" (Pet. App. 50a) and then held that all of the constituent parts of that fictional "program or activity" are covered by Section 504. The problem with the court of appeals' approach is that there is no federally assisted "program or activity" of "providing commercial air transportation." Rather, even if one construes "program or activity" broadly, there is still a program or activity of building and maintaining airports and an entirely separate (and unsubsidized) program or activity of flying passengers from one place to another.

Grove City plainly teaches that the "program specificity" limitation contained in Section 504 cannot be evaded merely by lumping together "interrelated" services and then calling them a single "program or activity." If "interrelatedness" were the test, this Court presumably would have identified the "program or activity" at issue in *Grove City* as "providing post-secondary education." Of course, the Court did not do so. Instead, applying "program specific" reasoning to tuition grants, the Court held that Congress did not intend the Department of Education (or the courts) to attempt to trace federal money "from classroom to classroom, building to building, or activity to activity." *Grove City*, 465 U.S. at 573. The obvious purpose of tuition grants, the Court found,

was to assist a school's financial aid program. *Ibid.* Accordingly, receipt by the school (or its students) of tuition grants meant that only the school's financial aid program was subject to regulation under Title IX. 465 U.S. at 573-574.

Thus, the clear teaching of *Grove City* is that the boundaries of a federally assisted program or activity are defined by the underlying grant statute. The government has no authority under Section 504 to regulate entities, or parts of entities, not receiving funds under a federal grant. See *Bd. of Public Instruction* v. *Finch*, 414 F.2d 1068, 1077-1079 (5th Cir. 1969), cited with approval in *North Haven*, 456 U.S. at 539. Grants under the Airport and Airway Improvement Act (and its predecessor statutes) are made to airport operators to support "program[s] or activit[ies]" involved in running an airport. The grant statute provides, in general terms, for the construction and improvement of *airports* and associated *ground* facilities; it furnishes no funds whatever for the purpose of transporting people from one place to another. (It is undisputed in this case that not one penny of federal funds is given to airlines under the Airport and Airway Improvement Act or its predecessor statutes.) Accordingly, it is clear that all federally assisted activities *at* airports, including the *ground operations* (*e.g.*, ticketing and baggage handling) of all airlines using such airports, are indeed subject to Section 504. See 49 C.F.R. Pt. 27, 44 Fed. Reg. 31442 *et seq.* (1979) (DOT's Section 504 regulations). But it is equally clear that Section 504's coverage cannot extend beyond the program or activity conducted by or under the auspices of the grant recipient. Neither the agency granting funds to airport operators nor the airport operators themselves have the authority under Section 504 to regulate an airline's practices

on board its planes, because air transport is simply not within the scope of the grant program. Contrary to the court of appeals' view that any distinction between an airline's activities *at* the airport and its activities on board its planes is "nonsensical" (Pet. App. 47a), we submit that such a distinction is the only interpretation consistent with the program-specific limitation on coverage mandated by this Court's decision in *Grove City*. The court of appeals' analysis would lead to the conclusion that it is equally "nonsensical" to distinguish between a financial aid program and an entire college. Simply stated, Section 504 is inapplicable to the "program or activity" of "providing commercial air transportation" (Pet. App. 50a) unless and until Congress furnishes the airlines with federal financial assistance for *flying*.

2. As was the case with its analysis of the air traffic control system (see pages 35-38, *infra*), the court of appeals was able to conclude that the on-board activities of commercial airlines are part of a federally assisted "program or activity" only by distorting two decades of consistent administrative interpretation. The history of the Section 504 regulations, set forth at pages 4-14, *supra*, demonstrates that the regulatory agencies never understood Title VI to reach the on-board activities of airlines not receiving subsidies from the CAB. Regulation of such activities was to be accomplished, however, under Section 404(b) of the Federal Aviation Act, which had been judicially interpreted to prohibit racial discrimination in air travel. See note 8, *supra*. It is true that both DOT and the Board initially expected the Board to promulgate regulations prohibiting all certificated carriers from discriminating against handicapped air travellers; this was to be accomplished, however, through renewed reliance

on Section 404(b), and not Section 504 alone. But the congressionally mandated "sunset" of Section 404(b) made it impossible for the Board to carry out its original intent to write regulations that would cover both subsidized and nonsubsidized carriers. The court of appeals erred in failing to acknowledge that, with the expiration of Section 404(b), the Board lost the authority it intended to invoke to issue the all-encompassing regulations mandated by the court. Neither DOT [18] nor the Board ever expressed the view that Section 504 alone provided the Board with such sweeping authority, and the court of appeals should have respected the agencies' determination of their own jurisdiction. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 13.[19]

C. Legislative Reports Expressing General Concern For The Transportation Problems Of The Disabled Are No Substitute For The Statute Actually Enacted By Congress.

The court of appeals was clearly unhappy with the limitations inherent in the scope of Section 504. To overcome these difficulties, the court relied heavily

[18] Contrary to the view of the court of appeals (see Pet. App. 48a), it is clear that DOT understood the Board's position with respect to its Section 504 jurisdiction. In the preamble to DOT's final Section 504 regulations, the Department noted that "the CAB determined that it had statutory authority to issue regulations governing air transportation of handicapped persons, both under section 504 of the Rehabilitation Act *and* under sections 404 and 411 of the Federal Aviation Act." 44 Fed. Reg. 31451 (1979) (emphasis added).

[19] Significantly, the court of appeals did not hold that the CAB erred in its interpretation of Section 404 of the Federal Aviation Act; indeed, the court was never asked to rule on the question. See note 11, *supra*.

(Pet. App. 41, 53a) on congressional reports demonstrating that, in enacting Section 504, Congress was acutely aware of the degree to which access to transportation is essential to the independence and employment opportunities of disabled persons. These concerns are real, but the inescapable conclusion is that the court of appeals put far more weight on Section 504 than the statute will bear.

Despite Congress's concern with accessible transportation for the disabled, not all transportation activities receive federal financial assistance. By including the "program or activity" limitation in Section 504, Congress necessarily enacted a statute that covers less than the entire field of transportation. As it happens, many forms of public transportation, including buses, subways, and trains, *are* covered by Section 504 by virtue of federal assistance programs such as those provided under the Urban Mass Transportation Act of 1964, 49 U.S.C. App. 1601 *et seq.*, and the Amtrak Improvement Act of 1981, 45 U.S.C. 601 *et seq.* But statements of congressional concern about an issue—even if they appeared in the Rehabilitation Act itself—would not support the extension of Section 504 to anything other than federally assisted programs. Cf. *Pennhurst State School & Hospital* v. *Haldeman*, 451 U.S. 1, 18-22 (1981). A fortiori, statements in committee reports (see Pet. App. 41a & n.116, 54a & n.151, 55a & n.152) cannot be read to extend the coverage of Section 504 or to dispense with the statute's program specificity limitation.

The court of appeals' emphasis (Pet. App. 54a-57a) on the fact that the Architectural and Transportation Barriers Compliance Board (ATBCB) urged the CAB to adopt a broad construction of Section 504

likewise misses the mark. Section 502 of the Rehabilitation Act of 1973, 29 U.S.C. 792, created the ATBCB primarily to ensure compliance with federal accessibility standards prescribed pursuant to the Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.* Those standards apply only to federal facilities and to certain facilities built with the assistance of federal funds. It is true that the ATBCB has a number of other advisory and study functions (see 29 U.S.C. 792(b) and (c)), but those functions are not relevant to the legal questions before this Court. Thus, the ATBCB has expertise in certain substantive areas of concern to disabled people, but the legal constraints imposed by the "program specificity" limitation on Section 504's coverage are not one of its areas of particular competence. The ATBCB's comments on the CAB's proposed regulations, therefore, may represent its views on appropriate social policy, but they do not advance the inquiry in this case.

II. THE FEDERAL AIR TRAFFIC CONTROL SYSTEM DOES NOT CONSTITUTE FEDERAL FINANCIAL ASSISTANCE TO AIRLINES

The court of appeals also erred in holding that the services of federal air traffic controllers constitute federal financial assistance to airlines. The legislative history of Title VI makes it clear that federally *conducted* programs—that is, programs funded solely by federal money—such as dams, harbors, or the air traffic control system—have *only* "beneficiaries"; there are no intermediate "recipients." As then-Deputy Attorney General Katzenbach explained (110 Cong. Rec. 13380 (1963) (footnote omitted)):

> Activities wholly carried out by the United States with Federal funds, such as river and

> harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc., are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal "assistance." While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI.

Stated differently, programs like the air traffic control system fall in the general category of "public goods"—goods and services from which all citizens and businesses benefit. The air traffic control system helps to ensure "safe skies." Arguably, this public benefit may "assist" airlines more directly than it assists other enterprises, yet it also assists all enterprises that use the airlines or fly private planes in the course of their business. It also protects those on the ground from plane crashes. It does not, however, constitute "Federal financial assistance" to anyone.

The court of appeals was able to reach a contrary conclusion only by distorting a consistent administrative interpretation of "Federal financial assistance" that dates back to 1964. The FAA's original Title VI regulations included the "*detail* of Federal personnel" as an example of "Federal financial assistance." 14 C.F.R. 15.23(3) (1965), 29 Fed. Reg. 19286 (1964) (emphasis added). DOT's current Title VI regulations continue the use of that phrase. 49 C.F.R. 21.23(c)(3). Clearly, the operation of the air traffic control system does not involve the "detail" of any federal personnel to the airlines. Indeed, as

earlier noted (see pages 35-36, *supra*), the air traffic control system is far more aptly described as a self-contained federally *conducted* program.

In 1978, the Department of Health, Education and Welfare published guidelines for other agencies to follow in promulgating regulations under Section 504 (see note 10, *supra*). HEW's guidelines substituted the word "services" for "detail," so that "Federal financial assistance" under Section 504 included the "[*s*]*ervices* of Federal personnel." 43 Fed. Reg. 2137 (1978) (emphasis added). It is clear, however, that HEW did not intend by this change to work any substantive alteration in the definition of "Federal financial assistance" (43 Fed. Reg. 2132 (1978)):

> Despite some difference in the wording of the definitions of federal financial assistance in the regulations implementing section 504 and title VI, the substance of the two definitions does not differ.

When the Department of Justice assumed oversight responsibility for Section 504 (see note 10, *supra*), it retained HEW's definition of "Federal financial assistance," including the "[s]ervices of Federal personnel." 28 C.F.R. 41.3(e). Again, however, there is nothing to indicate that "services" of federal personnel was to be construed any differently than the "detail" of federal personnel. But only by concluding that the "services" of federal personnel means something entirely different than the "detail" of federal personnel was the court of appeals able to hold that the federally operated air traffic control system constitutes federal financial assistance to airlines (Pet. App. 39a-40a). The court clearly erred in disregarding the longstanding and consistent administra-

tive interpretation of the agencies charged with administering Title VI and Section 504. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-7; *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

(10)

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No. 85-289

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Whether the Civil Aeronautics Board erred in finding, contrary to this Court's decision in Grove City College v. Bell, that only direct recipients of federal cash subsidies are subject to the nondiscrimination requirements of Section 504 of the Rehabilitation Act of 1973.

Whether the Civil Aeronautics Board erred in failing to adopt specific rules enforcing Department of Transportation regulations which prohibit commercial airlines from discriminatorily denying access to federally funded airports.

Whether the Civil Aeronautics Board erred in failing to adopt specific rules enforcing Department of Transportation regulations which prohibit federally funded airports from providing assistance to airlines discriminating on the basis of handicap.

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Sunset of the Civil Aeronautics Board: Hearing Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation, 98th Cong., 2d Sess. 13 (1984) .. 18,58

MISCELLANEOUS:

Airport Master Plans, FAA Advisory Circular No. 150/5070-6A (June 1985) 53

Air Transportation of Handicapped Persons, FAA Advisory Circular No. 120-32 (Mar. 25, 1977) 5

Airport Access Task Force, *Report and Recommendation of the Airport Access Task Force* (March 10, 1982) 54

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Note, *Airline Deregulation, Airport Regulation*, 93 Yale L.J. 319 (1983) 53,55, 56,83

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No. 85-289

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Petitioners,

v.

PARALYZED VETERANS OF AMERICA, ET AL.,

Respondents.

BRIEF FOR RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations referred to in petitioners' brief, the Section 504 regulations adopted by the Department of Transportation on May 31, 1979 are also involved in this case. Relevant excerpts from those regulations are reproduced in Appendix A to this brief.

STATEMENT

A. Introduction

This case involves a challenge by Paralyzed Veterans of America, American Council of the Blind, and American Coalition of Citizens with Disabilities to regulations adopted by the Civil Aeronautics Board ("CAB") implementing Section 504 of the Rehabilitation Act of 1973. Since the beginnings of commercial air transportation in the United States, handicapped persons have faced unpredictable and unnecessary obstacles in attempting to travel by air. The CAB's Section 504 regulations, which were to reduce this unpredictability and eliminate handicap discrimination by airlines, are in fact a nullity because they exclude from their coverage virtually all of the major airlines.

The CAB did not apply its regulations to major airlines because it concluded

that Section 504 applies only to direct recipients of cash subsidies from the federal government. The CAB acknowledged that airports are covered by Section 504 because they receive grants for the construction of runways, and that handicapped passengers are protected from discrimination in gaining access to ticket counters, checking their luggage and using passenger waiting facilities. However, the CAB's rules did not prohibit the airlines from discriminating on the basis of handicap and denying access to their airplanes. As a result, handicapped persons may meet passengers at airports, but they have no protection from discriminatory treatment if they wish to use those airports for their primary purpose and fly on a commercial airline.

B. Events Leading to the CAB Rulemaking

The federal government's recognition

of the problems faced by handicapped persons in flying on commercial airlines began at least as early as 1971. In October of that year, the CAB issued an advance notice of proposed rulemaking, 36 Fed. Reg. 20309 (Oct. 20, 1971), soliciting comments on the need for specific rules relating to air transportation of handicapped persons. However, the CAB did not propose any rules at the end of the comment period. The Federal Aviation Administration ("FAA") then started its own rulemaking, 38 Fed. Reg. 14747 (June 5, 1973), and in 1977 issued its rules on the carriage of handicapped persons. 42 Fed. Reg. 18392 (Apr. 7, 1977). Those rules simply required that each airline establish procedures for carrying passengers "who may require the assistance of another person during an emergency evacuation." Id. A later CAB rule did no more than

require compliance with the FAA rule. 42 Fed. Reg. 43828 (Aug. 31, 1977).

Neither the FAA rule nor the CAB rule was intended to implement Section 504, and neither provided any detailed guidance concerning what would constitute unlawful discrimination by the airlines. The FAA did, however, adopt an Advisory Circular in March of 1977 "to identify the problems handicapped air travelers face and to provide guidelines to airline personnel to help alleviate these problems." Air Transportation of Handicapped Persons, Advisory Circular No. 120-32 (Mar. 25, 1977). The Advisory Circular provided recommendations concerning the treatment of handicapped passengers inside the aircraft, including such matters as the placement of dog guides and seating arrangements.

Thus, by 1978, while the FAA and the CAB had recognized the problems faced by

handicapped persons in flying on commercial airlines, those agencies had not adopted the detailed regulations defining handicap discrimination required by Section 504 of the Rehabilitation Act.1/ Ultimately, the Department of Transportation ("DOT"), with overall responsibility for several federally funded transportation programs, issued proposed Section 504 rules in 1978, 43 Fed. Reg. 25015 (June 8, 1978), and adopted final rules a year later. 44 Fed. Reg. 31442 (May 31, 1979). These regulations, codified at 49 C.F.R. Part 27, were based on the earlier Section 504 guidelines adopted by the Department of Health, Education and Welfare and provided a broad description of the type of

1/ The case law and executive orders requiring the issuance of detailed Section 504 regulations by each agency are described in the decision below. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 3a - 4a.

discrimination prohibited by Section 504. 49 C.F.R. §§27.5, §27.7 (1984). They also provided detailed regulations concerning discrimination in certain federally-assisted activities, including rail terminals and airports. 49 C.F.R. §27.71.

DOT did not, however, adopt regulations relating to the accessibility of the aircraft or the practices of airline personnel on board aircraft, because it understood that the CAB intended to do so. DOT's reason for not extending its own regulations as broadly as it believed it could was set out in the preamble to its final rule;

> Following publication of the NPRM, representatives of the DOT, FAA, HEW, and the Civil Aeronautics Board (CAB) met to discuss the respective legal authority and responsibilities for improving the accessibility of air travel to handicapped persons. Following this meeting, the CAB determined that it had statutory authority to issue regulations governing air

transportation of handicapped persons, both under section 504 of the Rehabilitation Act and under sections 404 and 411 of the Federal Aviation Act.

Recently, the CAB advised the Department that a rulemaking project was underway to implement these sections. Action by the CAB which would ensure the uniform provision of services and equipment by the airlines, needed to accomplish accessibility to air travel for handicapped persons, could obviate the need for airport operators to provide the same services directly or indirectly, through their leasing arrangements with the airlines.

Accordingly, as CAB rules become final, the Department will review the requirements presently contained in §27.71 to determine whether these provisions are duplicative or unnecessary, and if appropriate, will amend the rule to modify or remove such requirements.

44 Fed. Reg. at 31451.2/

2/ DOT also deleted from its regulations a proposed requirement that guide dogs be permitted on aircraft and in terminals because it believed that "as a requirement pertaining to the accessibility of aircraft interiors, it was more appropriately dealt with by the forthcoming rules of the [CAB]." 44 Fed. Reg. at 31450-51.

DOT believed that regulation of practices relating to access to aircraft and the practices of airline personnel was necessary, and that there was adequate legal authority under Section 504 to adopt detailed regulations governing airline practices. DOT did not adopt such detailed regulations because it wished to avoid duplication and because the CAB had stated that its own regulations would cover airline practices.

C. The CAB Rulemaking

The CAB rulemaking project referred to in the preamble to the DOT regulations led to the rules presently at issue. The course of that rulemaking is described in the opinion below. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 5a-28a. Consistent with its representations to DOT, the CAB proposed regulations governing the rights of handicapped persons in gaining access to

and on board aircraft. Those regulations responded to evidence in the rulemaking record showing that handicapped persons had been subject to unpredictable and discriminatory practices in using many of the major airlines, including those that did not receive any direct cash subsidies from the federal government. See Court of Appeals Joint Appendix ("J.A.") 61-64, 66-68, 162-165, 170-179. The CAB's proposed regulations dealt with such matters as the need for attendants, wheelchair storage, seating arrangements, and the use of oxygen. The regulations did not, however, require any structural modifications of aircraft. 44 Fed. Reg. 32401, 32402 (June 6, 1979). The CAB initially proposed to apply these anti-discrimination regulations to "all certificated carriers and air taxis in their operations with aircraft of more than 30-seat passenger capacity." Id.

During the comment period, DOT urged the CAB to apply its regulations more broadly. DOT opposed a blanket exemption for small aircraft and suggested the detailed regulations should apply to all certificated carriers. Comments of DOT before the CAB at 4-5 (Sept. 13, 1979), J.A. 78-79. The other expert federal agency commenting on the CAB rule, the Architectural and Transportation Barriers Compliance Board, also urged that the rule should apply to all carriers. Pet. App. 55a.

In June 1982, the CAB adopted its final Section 504 rules. 47 Fed. Reg. 25936 (June 16, 1982). The CAB's regulations defining discrimination, set out in Subparts B and C of its rule, were similar to those initially proposed in 1979. Those regulations reflected a careful balancing by the CAB of the interests of the airlines and handicapped

persons. Subpart B addresses the most arbitrary airline practices, such as refusing to allow a blind person to stow his or her travel cane in the cabin. The effect of such practices was to burden or preclude altogether travel by handicapped people. Like the proposed rules, the final rules required no structural modifications.

However, the CAB substantially narrowed the coverage of the regulations, and declined to apply them to any of the major airlines. Stating that Section 504 is limited to direct recipients of federal funds, the CAB concluded that the detailed regulations required by Section 504 would apply only to those few carriers which actually receive direct cash subsidies from the government. 47 Fed. Reg. at

25936-38.3/

The result of the CAB's decision was to abandon the representation it had made to DOT and adopt the opposite of its initial proposal: rather than covering large aircraft and exempting small ones, it covered the few small aircraft operations which receive direct subsidies and exempted all of the major air carriers. Since all subsidy programs will end by 1988, not even the smallest airlines will be covered by the specific provisions of CAB's regulations after that date.

3/ The CAB relied on what it saw as "the accepted proposition that Section 504 is limited to direct recipients of federal funds." Pet. App. at 88a. It therefore concluded that the only federal financial assistance involving airlines was that provided under Sections 406 and 419 of the Federal Aviation Act, which provide for subsidies to airlines which carry the mail or provide other services to small communities. The Section 406 program terminated entirely at the end of fiscal year 1982; the Section 419 program terminates at the end of 1988. Petitioner's Brief ("Pet. Br.") at 5.

D. The Proceedings in the Court of Appeals

Respondents, three national organizations of handicapped persons which had participated in the CAB's rulemaking, sought judicial review of the CAB's final rules in the U.S. Court of Appeals for the D.C. Circuit pursuant to 49 U.S.C. §1486(a) (1976). In addition to challenging two specific provisions of those rules, respondents challenged the CAB's decision to limit coverage to those few airlines which receive direct cash subsidies from the government. The court of appeals affirmed the specific provisions of the CAB's rule, deferring to the agency's judgments about the practicalities of airline operations. Pet. App. 62a-75a. However, the court found the CAB's explanation for the reversal of its position on the scope of its authority "inadequate, vague and

contradictory." Pet. App. 57a.[4] The court determined that the CAB had misinterpreted the term "program or activity receiving federal financial assistance" and had improperly restricted the coverage of its Section 504 regulations to those few airlines which received direct cash subsidies. The court considered but did not decide whether the federal air traffic control system was a program or activity of federal financial assistance to airlines. Pet. App. 38a-45a. Rather, the court concluded that

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4/ In its Statement of the Case, the government suggests that the CAB reevaluated its jurisdiction in the course of its rulemaking due to a "contraction of the Board's statutory authority" by the Airline Deregulation Act, which provided for the sunset of Section 404(b) of the Federal Aviation Act. Pet. Br. at 12. This explanation for the CAB's change of its position is inadequate. The CAB was fully aware of the impending sunset of Section 404(b) well before it began its rulemaking in 1979, since the Airline Deregulation Act was passed in 1978. The CAB's initial understanding of the scope of its jurisdiction must therefore have been based on the language of Section 504.

the extensive cash grants provided for the construction of runways and other operational facilities at airports constitute federal financial assistance to a program or activity of which the flying of aircraft by commercial airlines is an integral part. Pet. App. 45a-62a. The court concluded that in enacting the Rehabilitation Act of 1973, Congress had intended to eliminate handicap discrimination in transportation wherever reasonably possible, and to protect handicapped air travelers not only before they board an aircraft and after deplaning, but while they are inside the airplane as well. Pet. App. 61a-62a. The court remanded the regulations to DOT as the CAB's successor agency with instructions to revise the regulations to apply to essentially all air carriers.

Pet. App. 73a-75a.[5/] The government's petition for reconsideration and for rehearing en banc was denied on April 26, 1985. Pet. App. 78a-83a.

E. DOT Action Subsequent to the Adoption of the CAB Regulations

This case has arisen primarily because of the CAB's failure to implement DOT's understanding of the obligations that should be imposed on airlines. DOT's actions after the CAB failed to extend its regulations to cover the major airlines

5/ On remand, DOT may consider the issue, raised for the first time in this Court by amicus International Air Transport Association, whether DOT's Section 504 regulations can apply to foreign carriers. The court directed DOT to fashion a rule on remand which is consistent with "its [DOT's] own understanding of the CAB's regulatory authority over air carriers as expressed throughout these proceedings...." Pet. App. 74a. The issue of whether Section 504 extends to foreign air carriers, which may involve sensitive questions of international comity and air safety, was not presented to the court of appeals and should be decided in the first instance by DOT as the responsible administrative agency.

demonstrate DOT's continued disagreement with the CAB's restricted interpretation of Section 504. In the summer of 1984, DOT's assistant secretary for policy and international affairs testified in Congress concerning the sunset of the CAB, and stated,

> The lapse of section 404 will not leave DOT without the ability to continue regulatory protection for the handicapped. We have adequate authority through section 504 of the Rehabilitation Act of 1973 and grants made under our Airport Improvement Program to assure that airlines afford the handicapped nondiscriminatory and safe access to air travel. We are currently exploring the need for rulemaking to establish specific and clearcut requirements in this area. Sunset of the Civil Aeronautics Board: Hearing before Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transportation, 98th Cong., 2d Sess. 13 (1984) (statement of Matthew V. Scocozza, Ass't Secretary, Department of Transportation) (emphasis added).

DOT did in fact commence the rulemaking referred to in this testimony. Prior to the court of appeals decision, DOT submitted proposed new Section 504 regulations to the Department of Justice for approval. A copy of what respondents understand were those proposed rules was submitted to the Clerk of the Court simultaneously with the filing of respondents' opposition to the petition for a writ of certiorari in this case.[6/]

Those proposed rules would have made the rules presently before this Court applicable to all certificated air carriers. DOT stated, "The Department believes that it is appropriate that all carriers be subject to the entire regulation.... As a policy matter, it is reasonable to apply the same set of

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6/ Relevant excerpts from the explanatory preamble to the proposed DOT rules are set forth in Appendix B to this brief.

standards, and a common set of enforcement procedures, to all carriers, whether or not they receive a subsidy." Office of the Secretary of the Department of Transportation, Notice of Proposed Rulemaking (undated) ("Proposed Notice") at 4 (Respondent's Appendix ("Resp. App.") at B-1 - B-2.

DOT confirmed that new rules, which would apply Subparts B and C of the CAB's regulations to the major airlines, were prepared by DOT and submitted to the Department of Justice for approval. DOT Semiannual Regulatory Agenda, 50 Fed. Reg. 44347, 44370 (Oct. 29, 1985). The Department of Justice has refused to approve those rules. Reply Memorandum of Petitioners for a Writ of Certiorari at 3 (October 1985).

SUMMARY OF ARGUMENT

I. The court of appeals decision is correct because it carries out the intent of Congress as expressed in both the airport and airway funding statutes and Section 504 of the Rehabilitation Act of 1973. The court's decision remedies the anomalous situation created by the CAB's rule, under which handicapped persons can use airports for some purposes, but are not protected from handicap discrimination if they wish to fly on a commercial airliner. That situation had resulted from the CAB's erroneous conclusion, reached prior to this Court's decision in Grove City College v. Bell, 465 U.S. 555, that only direct recipients of federal cash grants are subject to Section 504. The CAB therefore failed to consider whether commercial airlines are indirect recipients of federal assistance and what program or activity Congress intended to

fund. The CAB also failed to recognize that airline passengers, not airlines, are the ultimate beneficiaries and that the airlines cannot be allowed to deny passengers access to airports.

Unlike the CAB, the court of appeals looked to the purposes of the specific grant statutes under which funds are made available for the construction of runways, taxiways and other facilities for air travel. The structure of the grants provided under the airport and airway statutes demonstrates that Congress believed the ultimate beneficiaries of those grants would be airline passengers. The grants are funded almost entirely out of a tax on tickets paid by airline passengers, and much of the grant funds are allocated among airports on the basis of passenger enplanements. The individual grants themselves are provided only for facilities relating to the landing and

take-off of aircraft, and cannot be used for facilities that do not benefit passengers.

Airlines, in contrast to passengers, are not the ultimate beneficiaries of the federal financial assistance provided under airport and airway grants. The airlines, which use federally constructed runways and other facilities to enhance their own commercial enterprises, are an intermediary recipient, whose nondiscriminatory participation in the federally assisted program or activity is essential if the passengers are to receive the benefits intended for them. The airlines must therefore be subject to the antidiscrimination requirements of Section 504 and to the CAB's regulations.

The program or activity funded by Congress under the airport and airway statutes, and in which the airlines are a participant, is not, as the government

contends, simply "airports." The relevant program or activity, which is funded by grants for runways, taxiways and other facilities related to flying, includes the landing and take-off of commercial aircraft. The court of appeals correctly concluded that the flights of commercial aircraft into and out of those facilities are an integral part of that program or activity, and that it would frustrate Congress' intent under both the airport and airway statutes and Section 504 to allow airlines to discriminate against passengers using those facilities.

Contrary to the government's suggestion, the court of appeals decision will not have overly broad results. The airlines occupy a unique position between the direct recipients of federal financial assistance (airports) and the ultimate beneficiaries of that assistance (passengers). As explained in detail in

Part I (C) of this brief, airlines are in a position to control the management and operation of airports, through authority granted by federal statute and a complex system of contracts. At the same time, the airlines are in a position to control their potential passengers: without the airlines' cooperation, the ultimate beneficiaries of the federal financial assistance will never receive the benefits of that assistance at all.

Most importantly, the court of appeals decision is not overly broad because it is consistent with the goals of Section 504 and the explicitly expressed intent of Congress. Section 504 was enacted to increase access to transportation for handicapped persons, and it would frustrate Congress' intent to allow the arbitrary exclusion of handicapped persons from the most fundamental modern transportation system.

The court of appeals was therefore correct in finding that the relevant program or activity is not simply "airports," and in extending the coverage of Section 504 to the flying activities of commercial airlines.

II. Even if the government were correct in claiming that "airports" are the relevant program or activity, the airlines must be prohibited from discriminating on the basis of handicap. As explained in Part II of this brief, airlines are in a unique position to deny access to airports by refusing to carry handicapped persons. DOT's regulations and existing case law prohibit an entity such as an airline from interfering with the rights of ultimate beneficiaries of federal financial assistance. The CAB's regulations, for which DOT has now assumed responsibility and which define in detail actions which are discriminatory, must

therefore be extended to cover all major airlines to prevent those airlines from denying access to federally assisted airport facilities.

III. Further, as explained in Part III of this brief, even if "airports" alone are considered to be the relevant program or activity, DOT's regulations prohibit airports from providing assistance to another entity which discriminates on the basis of handicap. The type of assistance which is prohibited by DOT's regulations is illustrated by reference to cases defining state action under the Equal Protection Clause. Under those cases, particularly Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the discriminatory actions of one entity are properly attributed to another if the two entities have established a symbiotic relationship. Here, the operations, management, planning and

financial affairs of airlines and airports are intertwined by statute and by contractual arrangements. The airports and airlines depend on each other, both for their financial success and for their day to day operations. As a result, if an airline were to discriminate against a passenger on the basis of handicap, that discriminatory action would properly be the responsibility of the airport at which the discrimination occurred. The DOT should therefore require the airlines using federally assisted airports to comply with the detailed antidiscrimination regulations adopted by the CAB.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN FINDING AIRLINES ARE SUBJECT TO SECTION 504 BECAUSE AIRLINES ARE INDIRECT RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE THROUGH WHICH AIRLINE PASSENGERS RECEIVE THE BENEFITS OF FEDERAL GRANT PROGRAMS

In considering the scope of Section 504, the CAB proceeded on a legal premise that the government has since conceded was incorrect. In Grove City College v. Bell, 465 U.S. 555 (1984), the Justice Department argued, and this Court held, that federal antidiscrimination laws apply to indirect recipients of federal financial assistance as well as to those entities which receive direct cash grants. Without benefit of the Court's decision in Grove City, the CAB looked only to the direct subsidy statutes which it administered. Since few airlines receive direct cash subsidies, the CAB did not fully consider the fundamental questions of who the ultimate beneficiaries of the

federal financial assistance are, whether commercial airlines are indirect recipients of that assistance, and what program or activity Congress actually intended to fund.

A. <u>Airline Passengers, Not Airline Companies, Are the Ultimate Beneficiaries of the Federal Financial Assistance Provided Under the Airport and Airway Statutes</u>

By considering only the direct cash subsidies under Sections 406 and 419 of the Federal Aviation Act, the CAB ignored the massive federal assistance provided under the Airport and Airway Improvement Act of 1982, 49 U.S.C. §2201 <u>et seq.</u>, and its predecessor statute, the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219, <u>codified at</u> 49 U.S.C. §§1701 <u>et seq.</u> (repealed 1982). The structure of those statutes demonstrates that while federal financial assistance in the form of cash payments is

provided to airport authorities, airlines are the indirect recipients of that federal financial assistance, and must be prohibited from interfering with the rights of airline passengers who are the ultimate beneficiaries of that assistance.

The Airport and Airway Development Act of 1970 established the Airport and Airway Trust Fund, supported primarily by an airline ticket tax paid by passengers. Appropriations from the Trust Fund were used to pay for the Airport Development Assistance Program ("ADAP"), which provided grants to assist airport authorities in certain types of capital projects. ADAP accounted for about $4 billion in outlays in 1971-80. H.R. Rep. No. 24, 97th Cong., 1st Sess. 1-3 (1981). During this period, 84 percent of Trust Fund revenues was raised through the tax on the tickets of domestic scheduled airline passengers. <u>Id</u>.

The Airport and Airway Improvement Act of 1982, Title V, 49 U.S.C. §§2201-25, replaced ADAP with the Airport Improvement Program ("AIP"). The administration's 1986 budget lists outlays from the Trust Fund for grants-in-aid to airports of $693,898,000 in FY 1984 and estimates similar outlays for fiscal 1985 and 1986 as $760 million and $775 million, respectively.7/ Funds under the AIP are generally available only for "construction and improvement of facilities directly related to aircraft -- i.e., runways, taxiways and ramps."8/ Revenues provided by the passenger ticket tax, expressed as a percentage of total annual income to the Trust Fund, equal 72% in fiscal 1984 and are estimated at 68% for fiscal 1985 and

7/ Office of Management and Budget, Budget of the United States Government, The Federal Program by Agency and Account 8-150 (1985).

8/ Office of Technology Assessment, Airport System Development 28 (1984).

87% for fiscal 1986.9/

The procedure established by Congress is therefore one of federal cash grants for the construction of facilities for landing and take-off of aircraft and for the safety and convenience of the passengers on those aircraft. While the statutes allow certain uses of trust funds for terminal development, 49 U.S.C. §2212(b)(1), the funds are used primarily for projects relating directly to the flight of aircraft.

The ultimate beneficiaries of the federal financial assistance provided under either ADAP or AIP are the passengers who fly on the aircraft.10/

9/ Office of Management and Budget, Appendix to the Budget for Fiscal Year 1986 I-Q40 (1985).

10/ Congress' stated purpose in enacting the statutes was to accommodate the increasing amount of passenger traffic at airports. "During the next decade, substantial development will be required to ensure that our airport system continues to be safe and able to accommodate the
[footnote continued]

The entire framework for financing the ADAP and AIP demonstrates that Congress believed it was the airline passengers who would be the principal beneficiaries of the program and that passengers should pay for the facilities created. As the government acknowledges, the vast majority of contributions to the airport trust fund is derived from a tax on airline tickets that, by statute, must be paid by passengers. Pet. Br. at 27 n.17. Congress' determination that the passengers are the ultimate beneficiaries of the grants is also reflected in the statutory procedure for apportioning the

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10/ [continued]

increased traffic which is expected. In November 1980, FAA forecast that between 1979 and 1981 air carrier enplanements would grow 61.2 percent and commuter enplanements 170 percent." H.R. Rep. No. 24, 97th Cong., 1st Sess. 3. Congress' focus on "enplanements" demonstrates its concern about passengers as the principal beneficiaries of any increased funding provided. Had passenger enplanements not been increasing, there would have been little need to increase airport development.

funds collected from the tax on passengers' tickets. 49 U.S.C. §2206 provides that the funds which are appropriated by Congress from the Trust Fund will be apportioned among airports on the basis of passenger enplanements. 49 U.S.C. §2206(a)(1), (b).11/ Under this procedure, not only are the funds collected from passengers, but the benefits of those funds are returned to passengers on the basis of where they choose to land and take off.

Since the passengers of airlines are the ultimate beneficiaries of the federal financial assistance provided under the ADAP and the AIP, passengers are not subject to the nondiscrimination requirements of Section 504. However, the

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11/ The earlier ADAP program also apportioned funds to airport sponsors on the basis of passenger enplanements. See 49 U.S.C.A. §1715 (1976) (repealed 1982).

airports and the airlines which provide air transportation to those passengers <u>are</u> covered by Section 504. DOT acknowledges that the airports are covered by federal antidiscrimination statutes, concluding that "[t]his is so not merely because the airport operators literally 'receive' federal grants, but also because <u>they are not the intended ultimate beneficiaries of the federal assistance</u>." Pet. Br. at 23 (emphasis added).12/

Like the airport operators, the

12/ DOT's Section 504 regulations, 49 C.F.R. Part 27, apply to airports generally, with 49 C.F.R. §27.71 setting forth more detailed regulations relating to specific accessibility standards. See 44 Fed. Reg. 31442, 31450 (May 31, 1979). DOT's Title VI regulations also apply generally to airports and include a listing of the types of airport-related facilities which are covered. "This rule applies to fixed base operators, restaurants, snack bars, gift shops, ticket counters, baggage handlers, car rental agencies, limousines and taxis franchised by the airport sponsor, insurance underwriters, and other businesses catering to the public at the airport." 49 C.F.R. Part 21, App. C (1984).

airlines are not "the intended ultimate beneficiaries of the federal assistance" provided under the airport and airline statutes. Rather, the airlines are an intermediary between the direct recipient (the airport authority) and the ultimate beneficiaries (the airline passengers). Treating airlines and members of the travelling public as if they were identical, which is the government's position in this case, <u>see</u> Pet. Br. at 23, ignores the fundamental reality that airlines are in the business of providing transportation to passengers, and that passengers are dependent on the airlines if they wish to use the airports for their intended purpose. The airlines are in a position to deny the benefits of the federal assistance to passengers who are the intended class of beneficiaries which the federal statute is designed to serve.

The CAB ignored this critical

distinction between airlines and their passengers because of its assumption that the only entities which could be covered by Section 504 are those which receive direct cash grants. After Grove City, however, it is clear that an entity need not receive federal financial assistance directly from the government in order to be covered by federal antidiscrimination statutes; indirect recipients, like direct ones, cannot discriminate against the persons intended to be the ultimate beneficiaries of that assistance. Grove City, 465 U.S. at 564. The Court made this clear by referring to Bob Jones University v. Johnson, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975), where the district court stated that a "recipient is the intermediary entity whose non-discriminatory participation in the federally assisted program is essential to

the provision of benefits to the intended class which the federal statute is designed to serve."13/

DOT itself has recognized the significance of such an intermediary recipient, by defining "recipient" as an entity "to whom Federal financial assistance from the Department is extended directly or through another recipient, for any Federal program ... but such term does not include any ultimate beneficiary under any such program." 49 C.F.R. §27.5 (emphasis added). The identical concept appears in the Department of Justice regulations, which provide an authoritative interpretation of the scope

13/ Other cases recognizing the significance of indirect recipients as the essential intermediary through which ultimate beneficiaries are provided services are United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. ____, 105 S. Ct. 958, 83 L.Ed.2d 964 (1985); and Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985).

of Section 504. See 28 C.F.R. §41.3(d) (1985). Under the airport and airway grant statutes, the federal financial assistance is extended to the airlines through another recipient (the airport authority), and the airlines then extend that assistance to the ultimate beneficiaries (the airline passengers). Because of this relationship, airlines must be subject to federal antidiscrimination requirements.

CAB's error in assuming that only direct recipients are covered by Section 504 and in ignoring the critical intermediary role of airlines was compounded by its assumption that federal financial assistance has to be in the form of cash. DOT's regulations recognize that federal financial assistance can take the form of the use of real or personal property, not just cash, 49 C.F.R. §27.5, and this Court has long recognized in the

constitutional context that the provision of goods for an unconstitutional purpose is just as improper as the provision of cash. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973).

Further, the federal financial assistance here is cash, at least initially. The cash in the form of a federal grant goes directly to the airport, which then transforms it into something else (such as a runway) and provides it to the airlines. This transformation of federal cash into another form of assistance does not insulate that cash from the obligations it initially carries with it. The airlines are assisted by the federal cash just as surely as if the grant were made to them directly. The fact that the cash first passes through other hands and is thereby transformed into a runway for the airlines' use does not insulate the

airline from an obligation to ensure that the ultimate beneficiary is not illegally denied the benefits of those federal funds.

B. The Program or Activity Funded by the Airport and Airway Acts Includes the Flying of Commercial Aircraft Into or Out of Facilities Constructed with Federal Cash Grants

In Part III of its opinion in Grove City, the Court held that even if an entity is an indirect recipient of federal assistance, the nondiscrimination obligations of that recipient are limited to the program or activity to which assistance is extended. The remaining issue, therefore, is the definition of the program or activity for which Congress provides assistance in the form of grants for runways, taxiways and other aviation-related facilities.

The court of appeals was correct in including the flying activities of

airlines as part of that program or activity. The overall purpose of the 1970 and 1982 statutes was to fund "substantial expansion of the airport and airway system." 49 U.S.C. §1701 (repealed 1982); 49 U.S.C. §2201 (emphasis added).14/ In reporting the 1970 Act, the House

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14/ The House Report on the 1970 Act expressed the goal of creating an effective system.

> Since 1926 in the Air Commerce Act the federal government has exercised a vital role in the country's air transportation system. It may be that to identify the nation's air transportation as a "system" in 1926 is a gross inaccuracy, but through the years since then it has been developed into a system and perhaps the most effective transportation system ever achieved. The important point at this time is to maintain, and substantially update and improve, the system.

H.R. Rep. 601, 91st Cong., 1st Sess. 3 (Oct. 27, 1969) reprinted in 1970 U.S. Code Cong. & Ad. News 3049. The legislative history makes clear that Congress intended to fund not just airports, and not just airways, but a national system of federally funded facilities for flying, including the essential facilities for landing, take-off, and handling of passengers.

Committee on Interstate and Foreign Commerce noted, "... it is imperative to sustain and advance all aviation facilities necessary to support the actual flight of each aircraft." H. Rep. No. 91-601, 91st Cong. 1st Sess 3, *reprinted in* (1970) U.S. Code Cong. & Ad. News 3047, 3049 (emphasis added). To carry out these purposes, Congress established, among several other programs, the program for the construction of runways, taxiways and other similar facilities. That program is designed to assist flying, not simply to assist the "on-ground" activities of airport authorities.

Even if it could somehow be argued, as petitioners suggest at page 30 of their brief, that a grant for a runway is not related to flying (presumably because an airplane does not use the runway until it is actually on the ground and no longer technically "flying"), other types of

grants authorized under the ADAP and AIP relate only to in-flight operations. For example, grants for removal or marking of obstructions (authorized in the FAA's grant regulations at 14 C.F.R. §151.91 (1985)), or for wind and landing direction indicators (14 C.F.R. §151.95(e) (1985)) are clearly grants to assist in the flying of an airplane. The court of appeals correctly recognized that there is an indissoluble nexus between a grant for these purposes and the flying operations of airlines which rely directly on the facilities constructed with federal grant money.

In contrast to the definition adopted by the court of appeals, the government's definition of the relevant program or activity is inconsistent with *Grove City* because it does not take into account the nature and purposes of the grants themselves. The government's definition

appears to be "building and maintaining airports," Pet. Br. at 30, but it also states that the "ground operations (e.g. ticketing and baggage handling) of all airlines using such airports, are indeed subject to Section 504," id. at 31 (emphasis in original). There are inexplicable inconsistencies in this definition. DOT's regulations cover some of the activities inside a terminal building.15/ Those regulations would, for example, require ticketing facilities, as well as gift shops and restaurants, to be physically accessible to handicapped

15/ Those activities are covered even if the airport authority has only received a grant for obstruction removal off the airport site. In adopting its Section 504 regulations, the DOT stated "The [DOT] believes that all terminals constructed by or for airports that receive federal funds (e.g. for runway improvements). not only terminals actually constructed with federal funds, should be accessible." 44 Fed. Reg. 31450 (May 31, 1979). The DOT's Title VI regulations have also long covered many activities in the terminal. 49 C.F.R. Part 21, App. C, §(a)(1)(ii).

persons.16/

On the other hand, the regulations do not cover all of the activities in the terminal. They would not prevent an airline employee at the physically accessible ticket facility from refusing to sell a ticket or issue a boarding pass solely on the basis of a passenger's handicap. The regulations presumably would, however, prohibit a gift shop operator from refusing to sell a handicapped person a magazine that he or she wished to take to read on an airplane flight. The government fails to explain how its conception of the relevant program or activity can be so broad as to cover access to a gift shop located in a

16/ "Ticketing. The ticketing system shall be designed to provide handicapped persons with the opportunity to use the primary fare collection area to obtain ticket issuance and make fare payment." 49 C.F.R. §27.71(a)(2)(iii) (1985). As noted above at footnote 12, DOT's Title VI regulations cover restaurants, gift shops and similar facilities.

terminal constructed without any federal funds at all, but so narrow that it does not cover access to an airplane sitting on a runway built entirely with federal funds.17/

The government's failure to offer a consistent and workable definition of the relevant program or activity results from its simplistic view of the grant program established by the airport and airway statutes. That program is not simply "airports." Rather, it is a program which

17/ The government's definition is also irrationally narrow in another critical respect. While the government concedes that airlines' "ground operations" are covered by Section 504, its definition does not extend to all of the airlines' "ground operations." The government's definition does not cover discriminatory denials of boarding assistance or demands that a person be accompanied by an attendant, which of course occur on the ground before the aircraft even begins to move away from the gate. The discrimination which is of most frequent concern to handicapped persons does not in fact occur while flying, but rather while attempting to fly and while still on the ground at the airport. Nevertheless, by endorsing the CAB's rule, the government fails to cover those activities and prohibit discrimination in them.

is based on grants for runways, taxiways and other facilities necessary to facilitate the safe landing and take-off of airplanes. The court of appeals recognized, as did Congress, that the airlines' flying operations are in fact inextricably intertwined with runways and other facilities designed to help airplanes take off and land. The court of appeals was therefore correct in concluding that the relevant grant program encompassed "commercial air transportation," that Congress intended to provide assistance to a program of commercial aircraft landing and taking off from certain airports, and that any narrower conception of the program or activity would frustrate Congress' intent.

C. The Intermediary Role of Airlines Between Airports and Airline Passengers Is Sui Generis; Extension of Section 504 to Cover Airlines Will Not Subject Every Entity Which "Uses" a Federally Assisted Facility to Federal Antidiscrimination Laws

Respondents submit that the government's concern in this case is not in fact with the extension of Section 504 to cover commercial airlines. The DOT itself believes such coverage is appropriate and has proposed regulations which would cover commercial airlines. Resp. App. at B-1. Neither the government nor any of the various amici representing the airlines has specified how the extension of the CAB's rules to cover all airlines would cause the airlines any significant problems or expense. Application of the antidiscrimination rules to all airlines would only require them to implement, on a uniform and predictable basis, procedures which many

of them have already adopted. Those procedures require little financial expenditure and no extensive modification of any aircraft.

The government's concern is apparently a more theoretical one, reflecting what this Court has described as "the desire to keep §504 within manageable bounds." Alexander v. Choate, 469 U.S. ____, 105 S. Ct. 712, 720, 83 L.Ed.2d 661, 670 (1985). The government's expressions of alarm over the result of this case are unfounded, however, since there are important limitations on the scope of the court of appeals' decision.

First, contrary to the suggestion made by Judge Bork below, the extension of Section 504 to cover airlines would not "make every commercial enterprise a 'recipient' of federal aid when it merely makes use of a service or facility that receives any federal assistance." Pet.

App. 80a. Airlines are not covered by Section 504 merely because they use airports funded with federal grants. While the airlines may "use" some federally constructed facilities, in the sense that a farmer uses the Weather Service or a bus company uses a federally constructed highway, the airlines are much more than a mere "user of the airport."

The government's claim that airlines merely "use" the airports ignores the extraordinarily close managerial connections between airports and airlines, and the extent to which the airlines actually control airport planning and development.18/ For example, the 1982 Act provides, "In making a decision to undertake any airport development project

18/ These connections are in addition to the obvious operational connections, emphasized by the court of appeals, which relate to the physical use of airport runways by airplanes.

under this chapter, each sponsor of an airport shall undertake reasonable consultations with affected parties using the airport at which such project is proposed." 49 U.S.C. §2210(c).19/ This consultation process is critical to airport planning and development, See Airport Master Plans, FAA Advisory Circular No. 150/5070-6A (June, 1985), and gives incumbent airlines substantial control over the grant application process. Airlines already servicing an airport may use this required consultation to limit airport expansion and to prevent receipt of a federal grant. Note, Airline Deregulation, Airport Regulation, 93 Yale L.J. 319, 335 n.91 (1983), citing Airport

19/ DOT's regulations require that the grant application include "a statement that the sponsor, in making the decision to undertake the project, has consulted with air carriers using the airport." 14 C.F.R. §152.111(c)(10) (1985).

Access Task Force, Report and Recommendation of the Airport Access Task Force at 57 (presented to Congress on March 10, 1982).

Airlines and airports are also bound together by a complex system of contracts, which set out the detailed arrangements by which the airline contracts not only for the use of the runways and the terminals, but also for the actual management and operation of those facilities. For example, the Dallas-Ft. Worth Airport standard user agreement states, "The [Airport] Board and the Airline, through the Airline Advisory Board, agree to cooperate in the planning, development, and operation of the Airport." C. Rhyne, National Institute of Municipal Law Officers, Airports and the Law A-35 (1979). The Dallas-Ft. Worth contract also allows the airlines to demand an audit of the airport's records, id. at

A-27 (Section 5.14), requires the airport to consult with the airlines concerning concessionaires, id. (Section 6.1(a)), and prohibits the airport from charging any fees other than those set out in the contract. Id. at A-29 (Section 7.1).

Another common feature of airport use contracts is a requirement that the majority-in-interest of airlines (calculated by the number of enplanements) must agree on certain airport expansion projects. "Such clauses thus give the incumbent airlines the power to veto the airport's expansion." Airline Deregulation, Airport Regulation, supra p. 53, at 335.[20] The airlines therefore

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20/ "Because the incumbent airlines can generally refuse to sublease terminal space to other airlines, the incumbent airlines, rather than the airport, control access at airports where all terminal space has been leased." Airline Deregulation, Airport Regulation, supra p. 53, at 333. See also Patterson, Airport
[footnote continued]

control the development of the airport, participate in its management, and directly operate many of the facilities offered to the public on the airport site. One commentator concluded in analyzing the economic interconnections between airports and airlines, "[i]n fact, the long-term lease agreements may be viewed as a form of vertical integration between an airport and the incumbent airlines." Id. at 333 n.87.[21/] In claiming the court of appeals

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20/ [footnote continued]

Funding - Approaches for Spending the Surplus in the Trust Fund, 47 J. of Air Law and Commerce 519, 541 n.185 (1982). Airlines are of course further involved in airport management and operation when they buy and sell access to airport gates, when they construct their own terminals adjacent to the runways and taxiways, and when they transfer "slots" at crowded airports.

21/ This de facto control of airlines over airports vitiates the government's suggestion that airlines "cannot control the airport operators' decisions to accept or reject federal financial assistance." Pet. Br. at 29. Of course, even if airlines did not exercise such control, they can properly be required to comply with nondiscrimination requirements as a condition of using the federally constructed airports. DOT's
[footnote continued]

decision is overbroad, the government ignores this unique interrelationship, which differentiates the airport/airline relationship from any of the others mentioned by the government or by Judge Bork.

The government also ignores the critical role of congressional intent in defining the scope of a particular program or activity. In deciding to fund the creation of a national air transportation system, Congress was obviously aware of the role of airlines in that system; it knew that any benefits of that program would have to be provided to the ultimate beneficiaries by commercial airlines, since few persons have private airplanes.

21/ [footnote continued]

regulations already impose such requirements with respect to some airline activities (see 49 C.F.R. §27.71, relating to ticketing and baggage facilities) and airlines are generally required to provide Title VI assurances as a condition of using federally constructed airports. See note 31 infra.

Congress was also aware, at least as of the summer of 1984 when it was considering the CAB Sunset Act, that the DOT believed Section 504 did cover all airlines, and Congress included in the CAB Sunset Act language reflecting its belief that handicapped persons should be guaranteed access to air transportation.22/

Most significantly, Section 504 itself was enacted with access to transportation in mind. As the court of

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22/ See testimony of Matthew Scocozza, supra p. 18. The Civil Aeronautics Board Sunset Act of 1984 states:

> In furtherance of such a right [of transit through the navigable airspace], the Board or Secretary, as the case may be, shall consult with the Architectural and Transportation Barriers Compliance Board ... prior to issuing or amending any order, rule, regulation, or procedure that will have an impact on the accessibility of commercial airports or commercial air transportation for handicapped persons.

49 U.S.C. §1304 (emphasis added).

appeals noted, Congress emphasized in enacting Section 504 "even [if] the maximum employment opportunities for the handicapped [were] fully created, they could not be filled without the ability of handicapped individuals to get to their jobs." Pet. App. at 55a, citing S. Rep. No. 318, 93d Cong., 1st Sess., reprinted in (1973) U.S. Code Cong. & Ad. News, 2076, 2122.23/ "In addition to its specific transportation-related goals, in 1974 Congress made plain its objective that Section 504 'be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result.'" Pet. App. at 60a n.171,

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23/ In Alexander v. Choate, the Court noted Congress' emphasis on the elimination of discrimination in access to transportation as one of the principal goals of Section 504. Alexander v. Choate, 469 U.S. ____, 105 S. Ct. 712, 724, 83 L.Ed.2d 661, 669, 675-76 (1985).

citing S. Rep. No. 1297, reprinted in 1974 U.S. Code Cong. & Ad. News at 6391. Congress did not intend to permit the irrationally fragmented coverage created by the CAB's rule and did intend for Section 504 to apply to commercial air transportation. In contrast, there is no expression of congressional intent to cover the entities mentioned by Judge Bork, such as farmers, lawyers, and electric companies.24/

24/ In Grove City, the Court was plainly concerned about the traditionally delicate question of federal control over higher education. In contrast, DOT's regulatory authority over airlines is, and always has been, pervasive. Even after deregulation, the FAA's regulation extends to everything from aircrew certification to control over flight operations. See e.g., 14 C.F.R. Subchapter D; 14 C.F.R. Subchapter G (1985). Indeed, prior to the sunset of §404(b), discrimination on board aircraft was prohibited by the Federal Aviation Act. Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956). Extension of the DOT's authority to regulate handicap discrimination by airlines would therefore not constitute any sort of new federal intrusion into their operations.

Finally, the government's effort to characterize the court of appeals decision as overbroad ignores the extent to which passengers are dependent on airlines for access to federal benefits. If airlines are only a "user," or one of the beneficiaries of aid to airports, they are a peculiarly powerful one. The government is correct in stating that "Congress clearly did not intend that all those who rely on air travel be deemed 'recipients' of federal financial assistance to airports." Pet. Br. at 24-25. Congress did intend, however, that all those who provide air travel to the passengers who are the ultimate beneficiaries of the government's money be deemed "recipients." As explained more fully in the following section of this brief, the airlines are in a unique position to deny access to the passenger-beneficiaries who, ironically, are the persons who pay for the federal

financial assistance through a tax on their tickets.

Where an entity (the airline) is in a position to control the operations of the direct recipient (the airport authority), where it operates a commercial business that is heavily dependent on federal expenditures, and where it is in a position to deny access to the federal benefit to the ultimate beneficiaries (the passengers), that entity should be subject to the nondiscrimination requirements of the federal civil rights laws.25/

25/ The court of appeals did not reach the issue of whether the FAA's air traffic control ("ATC") system constitutes a program or activity of federal financial assistance to airlines, Pet. App. 45a, and this Court need not consider that question. Respondents continue to believe, however, that the ATC system should be considered federal financial assistance to the program or activity of operating commercial aircraft. The overall purpose of the ATC system, like many other federal programs, is to ensure the safety of the general public. However, the identification of a broad public purpose in a federal program does not resolve the issue of whether the government provides financial assistance to a particular entity in the course of serving a broader, more
[footnote continued]

II. SECTION 504 REGULATIONS DEFINING DISCRIMINATORY PRACTICES MUST APPLY TO AIRLINES TO ENSURE PASSENGERS ARE NOT DENIED ACCESS TO AND THE BENEFITS OF THE FEDERAL FINANCIAL ASSISTANCE TO AIRPORTS

Under DOT's own regulations and federal case law, DOT is responsible for ensuring that handicapped people are not discriminatorily denied access to any program or activity for which DOT provides assistance. DOT plainly anticipated that the CAB would adopt detailed rules to carry out this responsibility, but the CAB failed to do so.

25/ [footnote continued]

public purpose. Here, the federal assistance is focussed on one particular industry, and provides direct, continuous assistance and control to the airlines in the operation of their aircraft. It is therefore disingenuous to suggest that the airlines have the same relationship to the ATC system as all members of the general public. Where the federal government provides services that primarily benefit one particular industry, where those services are critical to the operation of that industry, and where the services can be used by the public at large only by relying on the industry as an intermediary, those services should be considered federal financial assistance.

Even if the government were correct in arguing that the only programs or activities funded by the airport and airway acts are airports, the CAB should have acted to ensure that handicapped persons are able to use those airports. Since airlines control access to the airports and can prevent the benefits of federal financial assistance from reaching the persons intended to receive them, the CAB should have enforced DOT's existing regulations by adopting rules governing airlines' treatment of their passengers.

The Section 504 rules adopted by DOT in May, 1979, established two levels of regulation. First, the DOT rules established general prohibitions against discrimination, setting forth the underlying principles of Section 504 and incorporating the standards defined in the governing HHS regulations. 49 C.F.R. Part 27, Subparts A-C, F. Second, the DOT

regulations set forth detailed regulations governing some of the specific activities subject to its jurisdiction, such as airports, rail terminals, and mass transit. 49 C.F.R. Part 27, Subpart D. Those rules covered some, but not all, activities in airport terminals, including some activities which were entirely within the control of airlines.26/

DOT's general regulations require the regulation of the airlines' practices in order to guarantee that passengers have access to the assistance provided by DOT. 49 C.F.R. §27.7(b)(1) provides

26/ As explained above, DOT did not adopt rules defining all of the precise types of discrimination by airlines which were prohibited since the CAB had represented that rules relating to airline operations were within its area of expertise and that it intended to adopt such rules. While the division of responsibilities between DOT and CAB left an unanticipated gap in the detailed regulatory structure, DOT's general regulations remain in effect and apply to all programs or activities to which DOT extends federal financial assistance, even if no detailed rules have been adopted.

> (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not substantially equal to that afforded persons who are not handicapped;27/

Under §27.7(b)(1), airlines are prohibited from discriminatorily denying access to airports; the CAB should have adopted specific rules to enforce this regulation. For most persons (that is,

27/ Section 27.7(b)(1) is identical to the parallel provision in the Department of Justice (formerly HEW) regulations. See 28 C.F.R. §41.51(b)(1). The HEW (now DOJ) regulations are an authoritative interpretation of the meaning and scope of Section 504, since they were effectively codified by the 1978 amendments to the Rehabilitation Act. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 635 n.16 (1984).

those who do not own their own airplanes), the commercial airlines are in complete control of access to airport facilities. While a person may be able to drive to an airport and visit it without relying on an airline, a person cannot use the airport for its principal function (landing and take-off in an airplane) without obtaining a ticket from an airline.28/ Even more specifically, a person cannot use the federally-funded portion of the airport (its runways and taxiways) without the consent of the airlines; physical access to the operational areas which are the focus of the federal funding is restricted

28/ "The primary function of an airport is to enplane and deplane passengers bound to and from other destinations. An airport cannot be said to operate for the fair use and benefit of the public, without unjust discrimination, if would-be passengers cannot benefit from and participate in this primary function: obtaining air transportation services." Proposed Notice at 7, Resp. App. at B-6 - B-7.

and controlled by the airline employees.29/

If a person is denied boarding at an airport on the basis of handicap, that person is denied access to and the benefit of a program or activity that has received federal assistance. Indeed, she is denied the benefits of two programs: she is denied the use of the airport at which she

29/ The absolute control by the airlines over access to and use of the airport distinguishes their situation from that of the baseball club in Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881 (4th Cir. 1982). There, while the Baltimore Orioles leased the stadium which was partially renovated with federal funds, the Orioles were not the exclusive tenant and were "legally powerless to make the extensive physical alterations demanded by plaintiffs...." Id. at 884. The Fourth Circuit also noted that "... the antidiscrimination policy of the [Rehabilitation] Act can be fully vindicated as regards Memorial Stadium by holding the City accountable, without stretching the Act to encompass the City's tenants." Id. at 885. In contrast, the airlines have exclusive power over the treatment of their passengers, and if the airlines' practices are not covered, the airport cannot ensure in any way that passengers receive a non-discriminatory opportunity to use the airport for its intended purpose.

wishes to board the aircraft, and is also denied the use of the airport to which she wants to fly.30/

Denial of access to airports violates DOT's regulations, and the CAB should have taken action to ensure that it does not occur. Under §27.7(b)(1)(i), the recipient (the airport) cannot "directly or through contractual, licensing or other arrangements" (here the airport's contracts with airlines) "deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service" (here, under the government's own formulation, the use of the airport). The airports have detailed

30/ The handicapped person is also denied access to a statutorily created right to travel by air. The Federal Aviation Act of 1958 created a right of public transit through airspace. 49 U.S.C. §1304 states, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

contractual agreements with the airlines but, under the present structure, allow those airlines to discriminate in a way that denies the benefits of the federal program to disabled persons. The DOT's general regulations already prohibit exactly this practice, and the DOT must therefore extend its detailed regulations to govern the specific airline practices which contribute to this unlawful discrimination.31/

31/ DOT has already recognized that airline practices relating to the treatment of passengers can be controlled through their leasing agreements with airports. "In fact, I don't think there is any question that we would have the authority to require a federally assisted airport in its contracts with carriers, who are given the right to use the facilities at those airports, that they provide that there will be no discrimination against the handicapped." Review of Airline Deregulation and Sunset of the CAB (Legislative Proposals Relating to Airline Deregulation and CAB Sunset): Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 98th Cong., 2d Sess. 16 (1984) (statement of James Burnley, Deputy Secretary [footnote continued]

The extension of Section 504 to cover airlines, and the promulgation of detailed rules to define discriminatory acts, is not only consistent with DOT's own regulations, but is also consistent with federal case law and with the program-specificity requirement of Grove City. The courts have consistently recognized that certain activities, even if they take place outside a federally funded program or activity, must be regulated in order to ensure access to the

31/ [footnote continued]

of Transportation). DOT's Title VI regulations require airport operators to obtain assurances of compliance with non-discrimination requirements from "each tenant, contractor and concessionaire who provides any activity, service or facility at the airport...." 49 C.F.R. Part 21, App. C §(b). See Section 15.4 of Dallas-Ft. Worth Contract in Rhyne, Airports and the Law at A-40, requiring airline compliance with Title VI in providing "any of its services."

federally funded program itself.32/ Just as a black student denied admission to a school as a result of a racially discriminatory admissions policy is effectively denied access to all that school's programs (including those which are federally assisted), a handicapped

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32/ See Cannon v. University of Chicago, 441 U.S. 677 (1979); Hillsdale College v. HEW, 696 F.2d 418, 428-29 (6th Cir. 1982), vacated and remanded, ___ U.S. ___, 104 S. Ct. 1673, 80 L.Ed.2d 149 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 n.2 (1st Cir. 1981) ("One who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted"), cert. denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321, 328 (E.D. Va. 1982); Haffer v. Temple University, 524 F. Supp. 531, 539 (E.D. Pa. 1981) ("discri- minatory admissions practices ... necessarily taint the entire institution"), aff'd and remanded per curiam, 688 F.2d 14 (3d Cir. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1387 (E.D. Mich. 1981) ("Racial discrimination respecting acceptance or admission into educational institutions permeates all programs and activities within those institutions"), aff'd, 699 F.2d 309 (6th Cir. 1983); see also Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (federal veteran's benefits may not be used by eligible veterans who attend university with racially discriminatory admissions policy), aff'd mem., 529 F.2d 514 (4th Cir. 1975).

person denied access to an airport by an airline's discriminatory policies is prevented from benefiting from the federally-assisted program.

DOT has already recognized the need to make its regulations applicable to airlines in order to prevent denials of access. "It would be insufficient to guarantee handicapped persons reasonable access to the airport without also guaranteeing them reasonable transportation services on the airplanes using the airport. Discrimination by air carriers on the basis of handicap would unjustly deny handicapped persons the fair and reasonable use of the airport." Proposed Notice at 7, Resp. App. at B-7.

While the CAB failed to carry out DOT's instructions to adopt specific rules to enforce §27.7(b)(1), DOT must now do so. DOT might not be able, as a practical matter, to regulate every entity which

could deny access to an airport, but it can and must regulate the airlines' practices. Airlines benefit directly from the cash grants to airports and are peculiarly dependent on those grants for the financial and practical success of their business. Further, the airlines are linked by contract and managerial arrangements to the airport, and the airports are dependent on the airlines for their financial success. The specific regulations prohibiting handicap discrimination must be extended to cover airlines to prevent them from denying handicapped persons access to federally financed airport facilities.

III. SECTION 504 REGULATIONS DEFINING DISCRIMINATORY PRACTICES MUST APPLY TO AIRLINES TO ENSURE THAT AIRPORTS DO NOT PROVIDE ASSISTANCE TO ENTITIES WHICH DISCRIMINATE ON THE BASIS OF HANDICAP

Regardless of whether airlines are considered to be recipients of federal

financial assistance, the government concedes that airports do receive such assistance. The airports are therefore subject to certain well-established prohibitions against both race and handicap discrimination. An airport, as a recipient of federal financial assistance, cannot discriminate itself and, more significantly for purposes of this case, cannot allow its own operations to become enmeshed with another entity (such as an airline) which does discriminate. Because of the unique relationship between airports and airlines, neither entity can be allowed to discriminate on the basis of handicap. Allowing airports to enter into such a symbiotic relationship with a discriminatory entity violates DOT's own regulations, which reflect fundamental principles of civil rights law.

Two of DOT's general antidiscrimination regulations prohibit

certain types of relationships between airports and entities such as airlines which may discriminate on the basis of handicap. First, 49 C.F.R. §27.7(b)(6) (Resp. App. A-5) forbids discrimination with regard to a service "provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance."33/ Here, the airlines are providing a service in or through exactly such a facility: the runways and other facilities for landing and take-off, and for providing other services to their

33/ The HEW regulation on which DOT's §27.7(b)(6) was based was applied in Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976). In Flanagan, the court held that a law school was prohibited by Title VI from discriminating in its financial aid program, even though the financial aid program received no federal assistance, because services were being provided to the school's students at a building constructed with federal funds.

passengers, which are constructed with federal grants. Section 27.7(b)(6) should therefore be applied to prohibit handicap discrimination by airlines.

The second DOT regulation which is relevant to the airport/airline relationship is 49 C.F.R. §27.7(b)(1)(v) (Resp. App. A-4), which states that a recipient of federal financial assistance cannot provide "financial or other assistance to an agency, organization or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipient's program." This regulation applies precisely to the relationship between airports and airlines.34/ If it

34/ The airport (the "recipient") is prohibited from providing "financial or other assistance" (which is not simply the use of the federally funded runways, but is also the entire complex of rights and services such as parking, fire protection, and passenger services) to an "agency, organization or person" (the airline), that discriminates in providing "any aid, benefit, or service" (air transportation) to "beneficiaries of the recipient's program" (airline passengers).

had been properly applied by the CAB, and if it were now enforced by DOT, the regulation would require the airports either to sever their relationship with airlines or take action to ensure that the airlines do not discriminate on the basis of handicap.[35/]

Section 27.7(b)(1)(v) reflects fundamental principles of civil rights law derived from cases involving the definition of "state action" under the Equal Protection Clause. Those cases provide valuable guidance in interpreting the scope of DOT's regulations because of the close link between the Equal Protection Clause and Title VI, and, in turn, the use of Title VI in modeling the

35/ As noted above at footnote 31, airports have the authority to prohibit discrimination through their leasing agreements with airlines. DOT's proposed regulations would define the type of discrimination prohibited by incorporating the detailed provisions of Subparts B and C of the CAB's rules. See Resp. App. B.

scope of Section 504.[36/] The DOT regulations, and the HEW regulations on which they are directly based, incorporate the underlying principles expressed in the state action cases and apply those principles to recipients of federal financial assistance who stand in the

36/ While the two statutory provisions cannot be read in pari materia with respect to each aspect of their applicability, the decisions of this Court suggest that Section 504 is at least as broad as Title VI. Alexander v. Choate, 469 U.S. ____, 105 S. Ct. 712, 716-717 nn.7, 11, 83 L.Ed.2d 661, 667 nn.7, 11 (1985); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). See United States v. Baylor University Medical Center, 736 F.2d 1039, 1045 (5th Cir. 1984), cert. denied, 469 U.S. ____, 105 S. Ct. 958, 83 L.Ed.2d 964 (1985). This Court has, in turn, ruled that Title VI's definition of racial discrimination is coextensive with the constitution's. Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983).

shoes of the federal government.37/

Section 27.7(b)(1)(v) is especially relevant here. That section embodies the principles first clearly announced by this Court in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). There, the Court held that a restaurant's refusal

37/ The analysis accompanying the HHS (now DOJ) regulations makes clear the intent to incorporate into the Section 504 regulations the principles of cases such as Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), Smith v. YMCA of Montgomery, 462 F.2d 634 (5th Cir. 1972), and Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975). The stated purpose of 45 C.F.R. §84.4(b)(1)(v), the parallel regulation on which DOT's §27.71(b)(1)(v) is based, is to prohibit "a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself." 45 C.F.R. Part 84 App. A (1984) Analysis of Final Regulation.

to serve black patrons was attributable to the city which owned and operated the parking garage where the restaurant was located and which profited from the discriminatory conduct of the restaurant. The Court held there was a "symbiotic relationship" between the restaurant and the city, concluding that state action exists when:

> The State has so far insinuated itself into a position of interdependence with ... the [acting party] that it must be recognized as a joint participant in the challenged activity...." Burton, 365 U.S. at 725.38/

38/ Recent cases holding that the principles announced in Burton remain a central element of state action analysis are Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278, 1287 (5th Cir. 1985) and Krynicky v. University of Pittsburgh, 742 F.2d 94, 99-101 (3d Cir. 1984). The DOT's regulations also reflect the principle set forth by this Court in cases such as Gilmore v. City of Montgomery, 417 U.S. 556 (1974), which held that the exclusive use of public property by a discriminatory organization constitutes state action. While those persons who have the luxury of owning their own airplanes can use federally-funded airports, the airlines do in reality have the exclusive use of the runways and other operational facilities at those airports.

The relationship between airports and airlines meets the Burton "symbiosis" test.[39] First, in Burton, the Court emphasized that the state profited from the discriminatory acts of the restaurant. Those profits "not only contribute[d] to, but also were indispensable elements in, the financial success of a government agency." 365 U.S. at 724. Cf. Citizens Council on Human Relations v. Buffalo Yacht Club, 438 F. Supp. 316, 324 (W.D.N.Y. 1977). Here, the airports are heavily dependent on the airlines' carrying of passengers for their financial

39/ In Nodleman v. Aero Mexico, 528 F. Supp. 475 (N.D. Cal. 1981), the district court refused to dismiss a claim based on allegations of handicap discrimination under the Fourteenth Amendment and the Burton theory that a municipal airport had established a symbiotic relationship with an airline. See also Turner v. City of Memphis, Tennessee, 369 U.S. 350 (1962), and United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala. 1962), both of which apply Burton to restaurants located in airports.

success.[40] The passengers and visitors attracted to the airports by the airlines' flights are also essential to the success of the lessees at the airport (such as restaurants and car rental agencies) who in turn make lease payments to the airports. Further, as noted earlier, the amount of federal funds available to an airport is dependent on the scope of the airlines' operations and the number of passenger enplanements; the airlines are in fact responsible for the initial collection of the tax on passenger tickets which provides the money for the grants to airports. As a practical matter, if no airplanes flew in and out of airports,

40/ Payments from airlines are indispensable to the airports. The landing fees charged by airports to airlines are generally calculated "to generate just enough revenue to cover the capital and operating costs of the airport." Note, Airline Deregulation, Airport Regulation, 93 Yale L.J. 319, 325 (1983) (describing the procedure by which airports are limited by 49 U.S.C. §1513 to charging airlines "reasonable" fees).

airports would have no financial viability at all.

Second, as in Burton, the discriminatory practices occur on the property of the entity to which the discriminatory action is to be attributed. The discrimination with which the CAB was concerned involves actions which occur while the aircraft are still at the airport: boarding assistance is provided, wheelchairs are stored, and decisions about whether a person must be accompanied by an attendant are made. Because the discrimination most frequently occurs before a passenger is even allowed to enter an aircraft, the airport itself is the site of the discriminatory action.41/

41/ In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), one of the grounds for distinguishing the status of the Moose Lodge club from the restaurant in Burton was that, "[u]nlike Burton, the Moose Lodge building is located on land owned by it, not by any public activity." Moose Lodge, 407 U.S. at 175.

In that sense, the airport's involvement is even more extensive than that of the state in Burton, where the discrimination occurred not in the public parking area, but in a distinct area identified as a restaurant under separate management.

Finally, the fundamental purposes of airports and airlines are literally symbiotic: without airports, airplanes cannot function; without airplanes, there would be no reason to have airports. This level of functional interdependence, which is further cemented by the financial and other contractual links between airports and airlines, compels the Court to treat airports and airlines as joint participants under the Burton test.42/

42/ Cf. Iron Arrow Honor Society v. Heckler, 702 F.2d 549 (5th Cir.), vacated, 464 U.S. 67 (1983), aff'd on remand, 722 F.2d 213 (5th Cir. 1984), in which the Fifth Circuit found that the actions of an honor society which received no federal funds were properly attributable to a university, because the university provided

[footnote continued]

This interdependence establishes the symbiosis required by Burton, regardless of whether it is adequate to establish that airports and airlines are one "program or activity" under Grove City. DOT's regulations, as well as those of the Department of Justice, already recognize this principle, and prohibit airports from providing assistance to any entity, including an airline, that discriminates on the basis of handicap. The airlines are therefore subject to the antidiscrimination requirements of Section 504, and the specific regulations established by the CAB should be applied to them.

42/ [footnote continued]

"substantial assistance" to the honor society whose discriminatory actions "unavoidably and necessarily" tainted the university's federally assisted programs. 702 F.2d at 564.

CONCLUSION

Paralyzed Veterans of America, American Council of the Blind, and American Coalition of Citizens with Disabilities sought review of the CAB's rules in the court of appeals because those rules failed to carry out Congress' intent to make federally assisted transportation facilities available to handicapped persons. By reversing its initial position with regard to the coverage of Section 504, the CAB created an irrational patchwork, under which handicapped persons are protected in using some incidental services at airports, but are not protected if they wish to use airports for their fundamental purpose of providing air transportation.

The court of appeals decision remanding the CAB's Section 504 rules to DOT should be affirmed, on either of two grounds. First, as explained in Part I,

the decision should be affirmed because the airlines' activity of flying passengers in and out of facilities constructed with federal funds is an integral part of a program or activity receiving federal financial assistance. Alternatively, as explained in Parts II and III, the decision below should be affirmed because, even if "airports" are the only program or activity receiving federal financial assistance from DOT, the airlines must be prohibited from engaging in handicap discrimination in order to ensure access to the airport and to ensure that federally funded airports do not provide assistance to a discriminatory entity.

On remand, DOT may consider the issue of whether its jurisdiction to prohibit discrimination by airlines under Section 504 or otherwise extends to foreign carriers. DOT can also determine the most

appropriate administrative procedure for enforcing its own existing regulations and for requiring airline compliance with the detailed antidiscrimination standards for which DOT has assumed responsibility after the sunset of the CAB.

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APPENDIX A

Excerpts from DOT Section 504 Regulations (49 C.F.R. Part 27)

§ 27.5 <u>Definitions</u>

"Discrimination" means denying handicapped persons the opportunity to participate in or benefit from any program or activity receiving Federal financial assistance.

"Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real or personal property or any interest in, or use of such property, including:

(1) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

"Primary recipient" means any recipient that is authorized or required to extend Federal financial assistance from the Department to another recipient for the purpose of carrying out a program.

"Recipient" means any State, territory, possession, the District of Columbia, or Puerto Rico, or any political subdivision thereof, or instrumentality thereof, any public or private agency, institution, organization, or other entity, or any individual in any State, territory, possession, the District of Columbia, or Puerto Rico, to whom Federal

financial assistance from the Department is extended directly or through another recipient, for any Federal program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

§27.7 Discrimination prohibited

(a) General. No qualified handicapped person shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance administered by the Department of Transportation.

(b) Discriminatory actions prohibited.

(1) A recipient, in providing any aid, benefit, or service, may not,

directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not substantially equal to that afforded persons who are not handicapped;...

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing financial or other assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;...

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefitting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased, or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

APPENDIX B

Excerpt from Proposed DOT Regulations, Referred to in DOT Semiannual Regulatory Agenda, 50 Fed. Reg. 44347, 44370 (Oct. 29, 1970) (Disapproved by Department of Justice, August 2, 1985)

Extension of Coverage of Subparts B and C to All Carriers

This proposal would extend to all carriers the specific nondiscrimination provisions of Subpart B and the enforcement mechanisms of Subpart C. The Department believes that it is appropriate that all carriers be subject to the entire regulation. Handicapped persons fly on all airlines, all of which must provide safe and adequate service to the public. Collectively, the carriers and handicapped passengers all use federally-assisted airports. Most airlines, including the largest carriers, do not receive subsidies. The majority of air trips taken by handicapped persons - and hence the principal need

for assuring nondiscriminatory treatment - are on non-subsidized carriers. As a policy matter, it is reasonable to apply the same set of standards, and a common set of enforcement procedures, to all carriers, whether or not they receive a subsidy.

It is unlikely that making non-subsidized carriers subject to the more detailed standards of Subpart B will impose significant burdens upon them. Under the existing rule, CAB told non-subsidized carriers to look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate under Subpart A. Consequently, significant or costly changes in carrier practices should not be necessary. On the other hand, having a common set of regulatory standards for all carriers should help to provide a basis for dealing with the

problem of inconsistency in carrier practices, about which disabled travelers have expressed considerable concern.

Legal Authority

The Department of Transportation will assume CAB's role in providing subsidies for essential air service under section 406 and 419 of the Federal Aviation Act. Consequently, the Department will be able to exercise, with respect to subsidized air carriers, the same section 504 authority exercised by the CAB. The situation is more complicated with respect to non-subsidized carriers, however, since they are not recipients of Federal financial assistance from the Department. The Department has concluded, however, that it has adequate authority to continue to impose requirements pertaining to the transportation of handicapped passengers on non-subsidized

air carriers.

First, the Department has indirect authority, derived from section 504 and from section 511 of the Airport and Airway Improvement Act, to prohibit discrimination on the ground of handicap by non-subsidized air carriers. This authority results from DOT's financial assistance relationship with most air carrier airports. Under the Airport Improvement Program, DOT provides financial assistance for runways, terminals, and other purposes to virtually all airports used by air carriers. As recipients of DOT financial assistance, these airports are subject to DOT's existing section 504 regulations (<u>see</u> 49 C.F.R. 27.71).

In addition, section 511 requires the Secretary to obtain written assurances from the project sponsor that "the airport to which the project relates

will be available for public use on fair and reasonable terms and without unjust discrimination....". Section 511 also directs the Secretary "to prescribe such project sponsorship requirements, consistent with the terms of [the Airport and Airway Improvement Act] as the Secretary considers necessary." Section 519 of the Airport and Airway Improvement Act authorizes the Secretary to promulgate regulations to carry out the Act's provisions.

Under these authorities, the Department may require federally-assisted airports, in turn, to require air carriers using airport facilities to comply with reasonable requirements concerning air transportation services for handicapped persons. In order to serve an airport, an air carrier must use the airport's facilities. Typically, there is a lease or other agreement

between the airport and the air carrier for the use of the airport's space and facilities.

Under this proposed regulation, the Department, through its combined section 504 and section 511 authority, would direct each federally-assisted airport to secure from all air carriers serving the airport an assurance of compliance with the Department's regulatory standards for service to handicapped persons. The assurance would become part of the lease or other agreements between the airport and the air carrier.

This approach to prohibiting discrimination on the basis of handicap is consistent with the statutory schemes of section 504 and section 511 as well as the purpose of the Airport Improvement Program. The primary function of an airport is to enplane and deplane passengers bound to and from other

destinations. An airport cannot be said to operate for the fair use and benefit of the public, without unjust discrimination, if would-be passengers cannot benefit from and participate in this primary function: obtaining air transportation services. It would be insufficient to guarantee handicapped persons reasonable access to the airport without also guaranteeing them reasonable transportation services on the airplanes using the airport. Discrimination by air carriers on the basis of handicap would unjustly deny handicapped persons the fair and reasonable use of the airport. Such discrimination would therefore contravene section 504 and section 511. Consistent with these statutes, an airport should not be permitted to allow air carrier users of its space and facilities to discriminate on the basis of handicap.

The assurance approach which this proposed rule takes is also consistent with existing practice. Current airport grant agreements contain standard assurances that the "sponsor" (i.e., the recipient of Federal funds) will operate the airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination.

As part of these assurances, the airport sponsor makes the following pledge:

> That in any agreement, contract, lease or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage <u>in any aeronautical activity</u> for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor -
>
> 1. To furnish said service on a fair, equal, and not unjustly discriminatory basis to <u>all users thereof</u> (emphasis supplied).

The airport sponsor also promises that

> It will comply with such rules as are promulgated to assure that no person shall, on the ground of race, creed, color, national origin, sex, <u>or handicap</u>, be excluded from participating in any activity conducted with or benefiting from funds received with the grant. (emphasis supplied)

This existing assurance language is important for two reasons. First, federally-assisted airports, in their grant agreements, have already promised to comply with rules that are promulgated to ensure nondiscrimination on the basis of handicap. Consequently, federally-assisted airports are already obligated to comply with requirements that would be promulgated as a result of this NPRM. Second, federally-assisted airports are already required to secure from air carriers with leases or other agreements to use the airport an assurance that the carrier will serve all

users on a nondiscriminatory basis. The proposed rule would add greater specificity to this existing assurance, committing the air carrier to compliance with the proposed provisions of DOT's regulation on air transportation for handicapped persons.

The active role of airports in enforcing the regulation would be limited to securing the required assurances from their air carriers and passing on, through the lease provision mechanism, enforcement action that has been considered and decided upon by DOT in noncompliance situations. The Department does not intend that federally-assisted airports would have to assume a "policing" role with respect to the substantive provisions of the regulation. Therefore, the Department anticipates that additional burdens on airports will be minimal.

In addition to its indirect section 504 and section 511 authority over air carriers, DOT also has direct section 404 authority over subsidized and non-subsidized carriers. In the Department's view, the obligation to provide safe and adequate service means that carriers are responsible for providing such service to all passengers. Denial of transportation to or unjust discrimination with respect to the transportation of persons with disabilities is inconsistent with this obligation.

The Department is aware that the CAB did not extend the coverage of Subparts B and C of the rule to non-subsidized carriers under the authority of section 404. This decision did not rest, however, on a legal determination by CAB that it lacked the authority to do so. The choice was one of policy, which CAB

described as a "compromise" between having no rule at all (as some commenters had preferred) and having a rule all of which applied to all carriers (as other commenters had requested). 47 FR 25938, June 16, 1982.

REPLY BRIEF

(11)

No. 85-289

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PARALYZED VETERANS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief, we argued that the court of appeals erred in requiring the Department of Transportation to promulgate regulations under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, that would regulate the in-flight activities of commercial airlines. We demonstrated that airport operators, and not the airlines, are the "recipients" of the federal financial assistance granted under the airport aid statutes, and we further demonstrated that the court of appeals erred in creating a "program or activity" of "providing commercial air transportation" pursuant to which the airlines are deemed

to be "indirect recipients" of federal aid to airport operators.

In reply, respondents advance two primary arguments not relied upon by the court of appeals to support their contention that all commercial airlines using federally assisted airports are "recipients" of federal financial assistance; we address these arguments below. First and foremost, however, respondents argue that it is anomalous to provide handicapped passengers with accommodations mandated by Section 504 with respect to services delivered at the airport, but not to provide handicapped persons with protection against discrimination if they wish to fly on a commercial airliner. See, *e.g.*, Resp. Br. 21. Respondents fail to acknowledge that Section 504 specifically limits the government's authority to extend regulatory coverage to the "recipients" of federal financial assistance, and, what is more, the statute reaches only the recipients' "programs or activities" that actually receive federal financial assistance. See, *e.g.*, *Grove City College* v. *Bell*, 465 U.S. 555 (1984). Like the court of appeals, respondents approach this case as if it should be decided in accordance with respondents' notions of good public policy rather than on the basis of a careful analysis of the legal constraints imposed by Section 504 and this Court's decisions interpreting the statute's "program specificity" limitation. Whatever holes may be thought to exist in the statutory scheme, therefore, cannot be filled through judicial rulemaking.[1]

[1] Similarly, it is irrelevant whether the Department of Transportation's draft proposal to make the regulations mandated by the court of appeals applicable to all commercial air carriers (see Resp. Br. 17-20) represents good policy. Respondents fail to acknowledge that the proposal has no *legal* status whatever; indeed, it does not even have the minimal status of proposed regulations. Instead, the proposal was transmitted to the Department of Justice with a request that it be approved for issuance as a Notice of Proposed Rulemaking. That request was denied on August 2, 1985, because the Department of Justice, acting pursuant to its Section 504 oversight authority (see Gov't Br. 12 n.10), concluded, as a legal matter, that the proposal was inconsistent with the program-specificity mandate of Section 504. In these circumstances, the proposal represents nothing more than interagency correspondence, and it simply has no relevance to the legal issues before this Court.

1. a. Respondents appear to argue that passengers on commercial airlines are not only beneficiaries of the federal financial assistance given to airport operators, but the *sole* beneficiaries of that assistance. See, *e.g.*, Resp. Br. 30-37 & n.10. The airlines, respondents contend, are therefore necessarily "indirect recipients" of federal aid to airport operators, serving as conduits for the flow of aid from the government to the ultimate benefit of passengers (Resp. Br. 29-40).[2] Respondents seek support for their posi-

[2] Respondents assert (Br. 29-30) that, contrary to this Court's decision in *Grove City* v. *Bell*, *supra*, the CAB never considered the possibility that the airlines might be recipients by virtue of the receipt of "indirect aid," maintaining instead that only direct grants constitute "Federal financial assistance" for purposes of Section 504. Respondents mischaracterize the CAB's position.

The only assistance programs ever administered by the CAB were direct subsidies to airlines. The FAA, a part of the Department of Transportation (see Gov't Br. 4 n.2), administered assistance to airports. As we explained in our opening brief (at 5-9), neither the FAA nor DOT ever purported to have the authority to regulate the in-flight activities of airlines under Title VI of the Civil Rights Act on the basis of those grants. Not surprisingly, therefore, the CAB stated in the preamble to its final Section 504 regulations that it had

tion both in the way Congress has determined to spend monies in the Airport and Airway Trust Fund and in Congress's allocation of the Trust Fund tax burdens among airport users (Resp. Br. 33-49).

In their second and somewhat parallel argument, respondents contend that commercial airlines are "recipients" of federal financial assistance with respect to their in-flight activities because the airlines, like colleges with discriminatory admissions policies, are in a position to bar handicapped persons from receiving the benefits Congress intended to confer on passengers through aid to airport operators (Resp. Br. 63-70). Relying on a regulation (49 C.F.R. 27.7 (b)(1)) that requires "recipients" to ensure that intermediate entities do not stand as an obstacle to the flow of benefits from the recipients to the ultimate beneficiaries, respondents argue that the airlines should be regarded as "indirect recipients" of federal financial assistance.

As we demonstrate below, neither of respondents' theories is correct. The history and specific provisions of the airport aid statutes evidence a clear congressional intent to benefit interstate commerce and aviation in general, not just commercial carriers or their passengers. It is for that reason that Congress has earmarked most of the money in the Airport and Airway Trust Fund for runways, taxiways, and safety devices, because those items benefit the noncommercial as much as the commercial aircraft, and the cargo carrier as much as the passenger carrier.

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considered but rejected the contention that there were programs other than direct subsidies that "assisted" the in-flight activities of airlines. Pet. App. 88a-89a. The CAB had no occasion to, and did not, contend that it is impossible for any entity to be an indirect recipient of federal financial assistance.

Similarly, Congress's intent to benefit aviation and commerce in general is evidenced by its decision to distribute the tax burden of aid to airport operators among all airport users, whether they be airlines, operators of private planes for business or pleasure, or travelling passengers.

As for respondents' second argument, we will show that airlines are in no sense conduits of money, goods, or services between the government and passengers in flight. Airlines neither deliver nor prevent delivery of airport services to passengers. The reality is that it is the airport operator that is assisted and which therefore has an obligation to be nondiscriminatory in its relations with all who use it, including not only passengers but the airlines as well. In the circumstances of this case, however, the obligations of airport operators cannot be transformed into obligations of the airlines with respect to their in-flight activities.

b. We agree with respondents' contention (Br. 30-37) that airline passengers are intended beneficiaries of statutes granting federal financial assistance to airport operators for the purpose of carrying out airport development and improvement projects. Respondents are plainly wrong, however, in their further contention that, if airline passengers are beneficiaries, then all other entities that also benefit from the same assistance must be "recipients" subject to regulation under Section 504. The fallacy in respondents' argument is that the airport operator obviously is the recipient; the airport grant legislation treats all other entities that benefit from the assistance, including passengers, alike, and all are "beneficiaries."

The intent of Congress in passing the airport grant statutes and Section 504 is determinative on the

issue of "recipient" status. Contrary to respondents' argument, however, Congress expressed no special intent to benefit passengers as such when it enacted the statutes providing assistance to airport operators. Instead, its purposes were much broader. That this is so is clear from the legislative history of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 *et seq.* (formerly codified at 49 U.S.C. (1976 ed.) 1701 *et seq.*) [hereinafter cited as the 1970 Act]. As the House Committee on Interstate and Foreign Commerce explained (H.R. Rep. 91-601, 91st Cong., 1st Sess. 6 (1969)):

> In addition to the actual users of the airport and airway system—such as airline passengers, general aviation, including private and business aviation operations, air freight forwarders, individual corporate and private shippers, etc.—there are others who benefit substantially from aviation; primarily, perhaps, the military should be considered. From a civilian standpoint those who benefit indirectly include the aircraft manufacturers and all of those whose employment is directly or indirectly related to aviation. To illustrate, an aircraft or aircraft component manufacturer may employ thousands of persons who never fly, yet those persons' economic lives depend entirely on aviation. More indirectly, but still to be considered, are those who make their livelihood by providing services for the manufacturers' employees. The employees of such corporations indirectly support such nonaviation interests as real estate brokers and builders, doctors, dentists, school teachers, etc. This is brought forth here to establish the fact that air transportation in a true sense touches every American home, whether those in the home ever fly or not.

Thus, Congress determined that federal financial assistance to airport operators was necessary not simply to benefit passengers, but to take account of the tremendous impact of the aviation industry on the nation's commerce. In the 1970 Act, for example, Congress explained that federal financial assistance to airports was necessary because "substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense." 84 Stat. 219. The Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2201(a)(2) [hereinafter cited as the 1982 Act], contains a virtually identical statement of congressional purpose.

Moreover, the "current and projected growth in aviation" (84 Stat. 219) that concerned Congress in 1970 was by no means limited to commercial air travel. On the contrary, Congress recognized the need to accommodate significant growth in five separate categories of civil aviation: air carriers and passengers, air cargo carriers, air taxis, private business flying, and private recreational flying. H.R. Rep. 91-601, *supra*, at 5. Huge growth was predicted not only in commercial aviation, but also in general aviation, which was expected to double its volume by 1980 (*id.* at 6).[3] Two of the biggest problems identified by the House Interstate and Foreign Commerce Committee were safety in general and congestion at general aviation airports (*id.* at 5). Similarly, the House Committee on Public Works and Transportation in 1981 described the 1970 Act as follows (H.R. Rep. 97-24, 97th Cong., 1st Sess. Pt. II, at 2):

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[3] As used herein, the term "commercial aviation" refers to all passenger carriers formerly certificated by the CAB, and the term "general aviation" refers to all other forms of civil aviation.

> Under the 1970 Act, Trust Fund revenues were used to fund a variety of programs. The Airport Development Program (ADAP) funded safety and capacity development at public airports of all sizes, both air carrier and general aviation airports.

Additionally, a 1984 study prepared by Congress's Office of Technology Assessment pointed out that general aviation activities account for about one-half of all aircraft operations at FAA-towered airports. Office of Technology Assessment, Congress of the United States, *OTA-STI-231, Airport System Development* 27. Moreover, general aviation airports use proportionately more federal money than commercial airports (*id.* at 140-141). Since 1970, the number of general aviation aircraft in use has grown by 63% and the number of hours flown by 67% (*id.* at 141):

> As a result, general aviation now exerts particular pressure on the runways, taxiways, and other airfield components of a number of major commercial airports, often accounting for more than half of all takeoffs and landings.

In short, Congress determined to provide federal financial assistance to airport operators for the benefit of all classes of "users," not merely passengers. Moreover, Congress intended all "users" to have the same status with respect to each other; all are the intended beneficiaries of federal financial assistance to airport operators.[4] It is nonsensical to suppose that Congress meant that all "beneficiaries," including those who never even fly (see H.R. Rep. 91-601, *supra*, at 6), are to be treated as "recipients" under Section 504 when they use or benefit from an airport at which federal aid was expended. It is far more consistent with the legislative scheme to treat all categories of aviation, as well as the public at large, as beneficiaries of the assistance program, just as all sorts of vehicles, commercial and private, are the beneficiaries of federally assisted highways.

[4] If anything differentiates airlines from passengers as beneficiaries, it is that airlines pay a fee to the airport in exchange for using it. That fact further militates against the notion that the airlines are "recipients" of federal financial assistance to airports.

c. That all entities using federally assisted airports are beneficiaries rather than recipients is made clearer from the fact that the "user" tax system that funds airport and airway development includes not only passengers, but all classes of aviation. Respondents stress (Br. 34-35) the high percentage of the Airport and Airway Trust Fund that comes from taxes on tickets paid by travelling passengers. But this fact attests to nothing more than the reality that there are enormous numbers of passengers, so that each pays relatively little, yet collectively their payments constitute the largest component of the Trust Fund. What is far more significant is that Congress intended *all* airport users to support the Trust Fund, thus equating the status of the airlines and other users to that of passengers. See, *e.g.*, H.R. Rep. 91-601, *supra*, at 41, 49-50 (expressly comparing Airport Trust Fund to the Highway Trust Fund); see also *id.* at 40 (Congress specifically intended to require general aviation to pay "a larger share of air user charges than at present"). Congress reiterated its commitment to "user support" in the 1982 airport grant legislation. See H.R. Rep. 97-24, *supra*, Pt. I, at 54-56 (letter from Secretary of Transportation Drew Lewis to Speaker O'Neill). What is more, both the Secretary's recommendation to Con-

gress and the legislation ultimately enacted in 1982 continued to treat all "users," including passengers, alike, by subjecting each category to the taxes necessary to support the grant program. See 26 U.S.C. 9502.[5]

2. As part of their attempt to link airports and airlines in the "indissoluble nexus" created by the court of appeals (Pet. App. 50a), respondents argue (Br. 55) that the airlines have statutory authorization to "veto" airport operators' receipt of federal financial assistance. Respondents' argument is incorrect.

Section 511(c) of the 1982 Act, 49 U.S.C. App. 2210(c), provides that, "[i]n making a decision to undertake any airport development project * * *, each sponsor of an airport shall undertake reasonable consultations with affected parties using the airport at which such project is proposed." The FAA has interpreted this provision in regulations and in a more detailed handbook, spelling out precisely the type of consultation that is required. Thus, pursuant to 14 C.F.R. 152.111(b)(10) and (11), an airport operator must consult with the airlines if the airport serves carriers and with the fixed-base operators

[5] As we noted in our opening brief (at 27 n.17), there is nothing in the legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, or Section 504 to suggest that the relationship between specific taxes and federal grants should be determinative of the question whether an entity is a "recipient." As a general matter, taxes should not be regarded as "user fees" any more than they should be treated as "premiums" in the context of the Social Security insurance program. See *Flemming* v. *Nestor*, 363 U.S. 603 (1960). Instead, the significance of the tax system in the case of the Airport and Airway Trust Fund is that passengers are treated merely as one class of "user."

(who rent space and furnish services, by subcontract or sublease, to general aviation) if the airport serves general aviation. The FAA's handbook prepared in connection with the 1970 Act explained that the scope of consultation

> will vary from airport to airport depending upon operational requirements, the relationship between the users and the sponsor and their financial commitments to each other. As long as users are afforded a reasonable opportunity to provide input prior to any final decision on proposed airport development, the fact that such users choose not to do so, or nonconcur in the proposed development, will not have the effect of nullifying any final decision by the sponsor. However, the project may not be approved unless the required consultation has been accomplished.

Federal Aviation Administration, Dep't of Transportation, *Airport Development Aid Program (ADAP) Handbook* 74 (1979).[6] The consultation process described in the FAA handbook hardly gives the airlines a "veto" over the plans of airport operators.[7]

[6] The FAA handbook was written to implement 49 U.S.C. (1976 ed.) 1718(b). The House Committee on Public Works and Transportation, in considering the 1982 Act, stated that the same type of consultation described in the FAA handbook was to be continued under the 1982 Act. H.R. Rep. 97-24, *supra*, Pt. II, at 14.

[7] The statutorily-required consultation with the airlines is not to be confused with the so-called majority-in-interest clauses that some airlines have negotiated with airports. These clauses, pursuant to which certain airlines exercise considerable power over airport expansion that might open an airport to additional competitors and cited by respondents (Br. 55-56 & n.10) as authority for the proposition that airlines possess the authority to prevent airport operators from

In any event, respondents' "veto" argument is not responsive to our point (Gov't Br. 28) that Congress intended, in passing Title VI of the Civil Rights Act of 1964 and Section 504, to regulate only those entities that have control over whether they will receive federal financial assistance. Even if we assume that some airlines may occasionally exercise a certain level of influence over airport operators' receipt of federal funds, the airlines cannot change the fact that, for all practical purposes, all major airports have received federal funds for capital improvements. The airlines cannot, as a practical matter, detach themselves from the federally assisted airport system that Congress established to serve the needs of interstate commerce and the national defense. Under these circumstances, the airlines may not be deemed "recipients" of federal financial assistance to airport operators. Compare *Grove City College* v. *Bell*, 465 U.S. 555, 565 n.13 (1984) (colleges "remain free to opt out of the federal student assistance programs").

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receiving federal grants, have been criticized as inconsistent with the pro-competition nature of airline deregulation. *Report and Recommendations of the Airport Access Task Force* 60-61 (1983). In any event, the clauses, which are entirely the product of bargaining between the airlines and the airports, have nothing to do with the matter at hand—congressional intent in enacting the airport aid statutes.

It also bears noting that a number of agency Section 504 regulations require recipients to consult with certain beneficiaries or their representatives, *i.e.*, handicapped persons, with respect to the recipients' federally assisted programs or activities. See, *e.g.*, 7 C.F.R. 15b.8(c)(1) (Department of Agriculture). Those who are consulted, including participants in the federally assisted programs or activities, have never been deemed "recipients" by virtue of such consultation.

3. Respondents erroneously contend (Br. 63-86) that regulations promulgated by the Department of Transportation (49 C.F.R. 27.5 and 27.7), as well as case law, support their theory that, whether or not the airlines are "recipients" of federal financial assistance within the meaning of Section 504, the airport operators, who unquestionably are "recipients," have a duty to ensure that the airlines also comply with Section 504. Respondents' argument begs the fundamental question in this case, which is whether the in-flight activities of the airlines constitute a federally assisted program or activity to which Section 504 applies. The regulations upon which respondents rely place restrictions upon *recipients* in the conduct of *their* federally assisted programs or activities. Thus, an airport operator, as a recipient, cannot deliver federally assisted airport services in a discriminatory manner. It cannot, for example, subcontract part of its federally assisted work to entities that will discriminate, nor can it deliver refreshment, refueling, or waiting room services through third parties that will discriminate.

To apply these regulations to aircraft in flight, however, one has to begin with the premise that the federally assisted "program or activity" includes flying. But that would be beginning at the wrong end. The question *presented* in this case is *whether* flying is or is not part of the assisted program or activity. For the reasons explained in our opening brief (at 29-32), we maintain that it is not.

The differences, moreover, between the situation in this case and the types of circumstances to which the regulations cited by respondents properly apply is readily apparent from an examination of the very cases upon which respondents rely. In *Frazier* v. *Bd.*

of Trustees, 765 F.2d 1278 (5th Cir. 1985), a private firm contracted with a hospital to perform the hospital's federally assisted respiratory therapy services. The firm discharged one of its respiratory therapists, who then contended that her discharge was related to her history of mental instability, that the contractor was a "recipient" of the federal financial assistance (Medicare and Medicaid payments) given to the hospital, and that the contractor's action in dismissing her violated Section 504. The court of appeals agreed that the employee had stated a claim under Section 504, relying on regulations (45 C.F.R. 84.3(f) and 84.4(b)(4)) that defined "recipients" and required the hospital to ensure that no person was subjected to discrimination in its federally assisted programs "through contractual or other arrangements." Thus, the court of appeals held that the hospital's contractor was obligated under Section 504 to deliver respiratory therapy services free of discrimination, just as if those services had been delivered by the hospital itself.

By contrast, the in-flight activities of airlines are not a part of an airport's assisted program that the airport has delegated to a contractor. To be sure, the airlines carry out some of their functions *in* the airport, such as ticketing and baggage checking; as to these functions, Section 504 obligations apply. But the airport does not receive federal financial assistance for operating aircraft in flight. The hospital in *Frazier*, on the other hand, collected federal funds for work done by the contractor. This fundamental distinction clearly shows that the regulations upon which respondents rely do not impose Section 504 obligations either on the airlines directly (with re-

spect to in-flight activities) or upon the airport to monitor the airlines' in-flight activities.[8]

Similarly, the airlines do not meet the definition of a "recipient" that was employed in *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (Table). The court there held that a "recipient" is "the intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve." Thus, the court concluded that private sector colleges were entities whose nondiscriminatory participation was essential to Congress's plan of educational assistance for veterans.

Repondents erroneously assume that the airlines in this case occupy the same role in the statutory scheme as the college in *Bob Jones University*. As we have demonstrated above, however, fulfillment of Congress's purposes in assisting airport operators requires the nondiscriminatory participation of those operators in the delivery of *airport services* to all who use or benefit from such services. Thus, it is the airport operators, and not the airlines, that parallel the

[8] Although it does not detract from the force of our position, we note our disagreement with the court of appeals' conclusion in *Frazier* that the contractor was a "recipient" of federal financial assistance. The contractor received payments from the hospital as the result of an arms' length business transaction, and thus it was not in fact receiving federal financial assistance, either directly or indirectly. In any event, what is relevant here is that aircraft in flight, in relation to airports, are not comparable to the contractor in relation to the recipient hospital: the airlines simply are not contractors of the airport operators performing services that the operators would otherwise perform themselves.

college in *Bob Jones University* and whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to those Congress intended to serve. The airlines, on the other hand, simply cannot be equated with the college in *Bob Jones University* when it comes to the delivery of *airport services*—the only federally assisted program involved in this case.

We reiterate that the determination whether an entity is a recipient or a beneficiary under any particular statutory scheme is ultimately a question of congressional intent. Congress's intent with respect to the delivery of airport services was expressed in the 1970 and 1982 Acts, discussed at pages 6-9, *supra*. We maintain that the purpose of those acts was to create a network of federally assisted airports. To be sure, all "flying" is ultimately benefitted, as is the public weal in general. But if the "program or activity" language of Section 504 is to mean anything at all, it must mean that the "recipient" that is subject to federal regulation is something less than every person or entity that ultimately benefits from the program Congress enacted.

Respondents also rely (Br. 77-78) on 49 C.F.R. 27.7(b)(1)(v) (emphasis added), which prohibits recipients from "[a]id[ing] or perpetuat[ing] discrimination against a qualified handicapped person by providing financial or other assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the *recipient's program*." Such reliance is misplaced. As before, respondents have reasoned from, not to, their conclusion.

The regulation prohibits discrimination against the beneficiaries of the recipient's federally assisted pro-

gram *in that program*. Here, the recipient's program is running an airport. The beneficiaries of that progam, including the airlines themselves, are thus protected against discrimination by the airport operator on the basis of handicap (and, in the case of airlines, the handicap of any qualified employee). But the regulation itself does not cover in-flight activities, because they are not part of the recipient's program or activity. Nor do the airlines' in-flight policies discriminate against anyone in the use of airport services. The regulation merely assures that, if certain programs or activities are federally assisted, the recipient may not provide its own assistance to others who discriminate in those same programs, thereby paralleling the ban (see pages 13-15, *supra*) on a recipient's permitting its contractors to discriminate.[9]

4. Finally, respondents assert (Br. 62 n.25) that the court of appeals did not reach the question whether the FAA's air traffic control system constitutes federal financial assistance to the airlines, and they contend that this Court need not consider the issue. We disagree. First, respondents conveniently ignore the fact that the Court granted the government's petition for a writ of certiorari on that question (see Pet. I). Second, as we pointed out in the petition (at 21-22 & n.15), the court of appeals

[9] We note, moreover, that an "agency's authority under [Section 504] both to promulgate regulations and to terminate funds is subject to the program-specific[ity] limitation [implicit in Section 504]." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 538 (1982). Thus, the regulations cited by respondents must be read in light of the "program specificity" limitations mandated by *North Haven* and *Grove City*. Respondents' inability to demonstrate that "flying" is a federally assisted program makes the regulations upon which they rely totally inapplicable.

held that the air traffic control system constitutes federal financial assistance to all airlines within the meaning of Section 504 (Pet. App. 40a), but it declined to define the program or activity covered by that assistance (*id.* at 44a-45a). Thus, if this Court were to reverse only that part of the decision below holding that federal assistance to airports requires airlines to comply with Section 504 in their "program or activity" of "providing commercial air transportation" (Pet. App. 50a), the Department of Transportation still would be left with a holding that all airlines receive federal financial assistance within the meaning of Section 504 by virtue of their use of the air traffic control system. Although it would be open to the Department to determine the relevant "program or activity" in the first instance, the Department still would presumably be required to promulgate regulations consistent with that determination. On the other hand, a decision by this Court that the air traffic control system is not federal financial assistance to airlines at all would obviate the need for further administrative and judicial proceedings regarding the scope of the "program or activity."

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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AMICUS CURIAE

BRIEF

(4)

No. 85-289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

U.S. DEPARTMENT OF TRANSPORTATION, *et al.*

Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et al.*

Respondents.

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether commercial airlines which do not receive federal financial assistance, but which use airports receiving federal financial assistance, are rendered subject to §504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, because of such use.

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IN THE SUPREME COURT OF THE UNITED STATES
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Respondents

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

The Air Transport Association of America (ATA), as amicus curiae, supports the position taken by the Petitioners regarding the decision below. Written consent to file this brief has been filed with the Clerk of the Court.

INTEREST OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

ATA is a non-profit, unincorporated trade association of federally licensed U.S. and Canadian airlines.[1/] ATA members provide passenger and cargo service nationally and/or internationally, are certificated by the Department of Transportation (DOT), and are subject to DOT's regulatory authority. ATA, therefore, has a substantial interest in the extent of DOT's authority to implement §504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (1982), as such authority directly affects its members.

STATEMENT

In the decision below, the court of appeals held[2/] that the activity of "commercial air transportation" as conducted by commercial airlines is a recipient of federal financial assistance granted to public airports.

1/ ATA's members are: AirCal, Inc., Air Canada, Alaska Airlines, Inc., Aloha Airlines, American Airlines, Inc., Best Airlines, Inc., Braniff, Inc., Continental Airlines Corporation, CP Air, Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Jet America Airlines, Inc., Midway Airlines, Inc., Muse Air Corporation, Northwest Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Airlines, PSAPacific Southwest Airlines, Purolator Courier Corporation, Republic Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., United Parcel Service, USAir, Inc., Western Airlines, Inc., and World Airways, Inc.

2/ Although ATA agrees with Petitioner Department of Transportation that operation of the Air Traffic Control system does not constitute federal financial assistance, ATA does not believe the court below so held, despite demonstrating a clear desire to do so. Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 624, 710-713 (D.C. Cir. 1985).

Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694, 716 (D.C. Cir. 1985).

A careful review of the court's analysis reveals considerable confusion in distinguishing the issue of whether airlines receive financial assistance within the meaning of §504, from the issue of identifying what program or activity receives such assistance. It is not clear whether the court held airlines are indirect recipients of funds granted to airports, just as Grove City College was an indirect recipient of funds granted to its students,[3/] or whether airlines are direct recipients of federal financial

3/ Grove City College v. Bell, __ U.S. ___, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984) [hereinafter cited as Grove City].

assistance to airports. In fact, it appears that the court below found that commercial air transportation is an "activity" jointly conducted by airlines and airports, so that what one receives the other also receives.[4/] "[W]hen it comes to the 'program or activity' of providing air transportation to the traveling public, [airports and airlines] are so functionally integrated that they become one." Paralyzed Veterans, supra, at 715.

If the court of appeals intended to find that airlines are indirect recipients of the financial assistance rendered to airports, then it misapplied the decision in Grove City to the facts

4/ See Order Denying Suggestion For Rehearing En Banc, Dissenting Opinion (Bork), Petition For Writ of Certiorari, App. C, pp. 78a, 80a.

of this case. On the other hand, if the court of appeals intended to find that airlines are direct recipients because they are "inextricably intertwined" with airports, then the court below simply ignored the holding of Grove City, supra note 3, and Consolidated Rail Corporation v. Darrone, _____ U.S. _____, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984).

SUMMARY OF ARGUMENT

ATA believes that the court of appeals failed to correctly apply to the facts of this case the analytical framework developed in Grove City in resolving the issue of whether commercial air carriers are recipients of federal financial assistance for purposes of §504 of the Rehabilitation Act of 1973, as amended. In so doing, the court incorrectly determined that DOT

has authority to issue regulations implementing §504 which apply to all commercial air carriers.

In Grove City, the Court first addressed the question of whether Grove City College was a recipient of federal financial assistance, and then identified the education program receiving such assistance. In the first step, the Court examined the purpose of the underlying student aid program, and determined that higher education institutions were intended to be indirect recipients of the aid rendered directly to students. The Court then examined where the funds went and how they were used, and concluded that the college's financial aid program was the "program or activity" receiving the federal funds.

In the case at bar, had the court of appeals properly applied this analytical framework to this case, it would have examined the language and legislative history of the Airport and Airway Development Act of 1970, ante p. 18, as well as regulations issued by the Federal Aviation Administration implementing the airport development program, which the court identified as the source of the federal financial assistance triggering §504 application to all airlines.

A review of these items reveals that the purpose of the airport development grant program is limited to assisting airport sponsors to develop safe, efficient airports. Nothing in the statute, the legislative history or the FAA regulations suggests that airlines were intended to be indirect recipients

of the funds granted to airports. Thus, the facts of this case are distinguishable from the facts in Grove City.

Another fact distinguishing the two cases is that there is no statutory relationship between the airport grant program and §504, as there was between the student aid program and Title IX in Grove City. Consequently, the two statutes involved here do not serve a single, overriding purpose as was the case in Grove City.

Additionally, in Grove City, there was no queston but that the College did receive the funds granted to its students. In the present case, there is no evidence that the funds received by airports are transferred to airlines. Thus, there can be no factual basis to support the conclusion that airlines are indirect recipients of

federal financial assistance rendered to airports.

In light of the above, it is clear that airlines were not intended to be, nor are they in fact, indirect recipients of the federal financial assistance rendered to airports.

The court of appeals also erred in its holding that "commercial air transportation" is a "program or activity" within the meaning of §504. A review of the legislative history of §504 demonstrates that Congress gave the term "program or activity" its common usage, and meant only specific programs clearly defined by the underlying federal grant program. Congress did not intend for the inter-related commercial operations of two separate entities to be considered within the meaning of "program or activity."

ARGUMENT

I. AIRLINES ARE NOT INDIRECT RECIPIENTS OF FEDERAL FINANCIAL AID

A. THIS COURT'S DECISION IN GROVE CITY TURNED ON THE FINDING THAT HIGHER EDUCATION INSTITUTIONS WERE INTENDED TO RECEIVE THE FINANCIAL ASSISTANCE RENDERED TO THEIR STUDENTS, AND ON THE UNIQUE RELATIONSHIP BETWEEN THE STUDENT FINANCIAL AID PROGRAM AT ISSUE AND TITLE IX.

In Grove City, this Court identified a two-step analysis to determine if Title IX[5/] applied to Grove City College because of Basic Educational Opportunity Grants (BEOG's) made directly to students attending the college.[6/] In the first step, this Court addressed the question of whether Grove City was a recipient of federal

5/ Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 235, 373.

6/ Grove City, supra note 3, at 1214.

financial assistance. In the second step, this Court addressed the problem of identifying the education "program or activity" receiving such assistance.[7/]

Applying this analysis, this Court found that Grove City College was an indirect recipient of financial assistance rendered to some of its students by the Department of Education under the BEOG program.[8/] In reaching this conclusion, the Court focused on the fact that both the BEOG program and Title IX were created by the Education Amendments of 1972,[9/] and on the importance of these provisions to the

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7/ Id.

8/ 20 U.S.C.A. §1070a (1978 and West Supp. 1985).

9/ Pub. L. No. 92-318, 86 Stat. 235 (1972).

underlying purpose of the Education Amendments, i.e., to prohibit sex discrimination in education programs receiving federal funds:

> The structure of the Education Amendments of 1972, in which Congress both created the BEOG program and imposed Title IX's nondiscrimination requirement, strongly suggests an affirmative conclusion [that Grove City receives indirect Federal financial assistance through students receiving [BEOG's]. BEOG's were aptly characterized as a "centerpiece of the bill," . . . and Title IX "relate[d] directly to [its] central purpose."

Grove City, 104 S.Ct. at 1216-17 (citations omitted).

In addition to recognizing "this connection," Grove City, supra note 3 at 1217, this court observed that Congress had taken express notice of existing "discrimination in the administration of student financial aid programs (footnote omitted)," id., and that "the BEOG program was structured

to ensure . . . it effectively supplements the College's own financial aid program (footnote omitted)," id. On this basis, the Court concluded that Grove City indirectly received financial aid granted to its students to finance their education. Id. at 1220.

This Court found additional support for its conclusion in both the contemporaneous and subsequent legislative history to the BEOG program. The Court took note that one of the stated purposes of the Education Amendments was to assist institutions of higher education through the student aid provisions. Id. at 1218. The Court also found persuasive that Congress, although given the opportunity, had failed to disapprove regulations stating that Title IX coverage is triggered by the indirect receipt of funds from students directly

receiving financial aid. Id. at 1219.

What Grove City teaches us is that the BEOG program was intentionally designed by Congress to render financial assistance to colleges and universities, whether a school applied for and received the BEOG funds directly, or whether the funds were first paid to a student who then became a mere conduit through which the BEOG funds reached the school. As the Court noted, Congress did not intend to elevate form over substance with respect to the BEOG program. Id. at 1217.

B. THE AIRPORT AND AIRWAYS DEVELOPMENT ACT WAS NOT INTENDED TO ASSIST AIRLINES.

1. The Purpose of Granting Airports Financial Assistance is to Provide Funds for Airport Development.

Federal financial assistance for airport development began in 1946 under

the Federal Airport Act (Airport Act).10/ The purpose of the Airport Act was to provide aid "for airport construction, improvement and repair," so that a national airport system "adequate to anticipate and meet the needs of civil aeronautics in the United States . . ." could be developed.11/

Section three of the Airport Act established the National Airport Plan, requiring the Administrator of the Civil Aeronautics Administration to develop and revise annually a "national plan for the development of public

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10/ Pub. L. No. 79-377, Ch.251, 60 Stat. 170 (1946)

11/ H.R. Rep. No. 844, 79th Cong., 1st Sess., 1-2 (1945), to accompany H.R. 3615, reprinted in 2 Legislative History to the Federal Airport Act 575-76 (1948).

airports in the United States . . ."12/ In order to establish such a national system of airports, Section four of the Airport Act authorized the Administrator to make grants for airport development.13/

The policy established by the Airport Act of nurturing the development of public airports by providing

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12/ Ch. 251, §3(a), supra note 10.

13/ Id. §4. "Airport development" is defined in §2(3) to mean "(A) any work involved in constructing, improving, or repairing a public airport or portion thereof, including the construction, alteration, and repair of airport administrative buildings and the removal, lowering, relocation, and marking and lighting of airport hazards, and (B) any acquisition of land or of any interest therein, or of any easement through or other interest in air space, which is necessary to permit any such work or to remove or mitigate, or prevent or limit the establishment of, airport hazards; but such term does not include the construction, alteration, or repair of airport hangars." Airport Act, supra note 10, §2(3).

financial assistance for capital improvements was continued by the enactment of the Airport and Airways Development Act of 1970, generally known as ADAP.[14/]

Section two of ADAP contains a policy statement declaring that the airport and airway system is inadequate to meet current and projected aviation needs, and that "substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense."[15/]

Under ADAP, the Secretary of the Department of Transportation is

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[14/] Pub. L. No. 91-258, 84 Stat. 219 (1970), 49 U.S.C. §§ 1701, et seq (repealed, in part, 1982).

[15/] Id. §2.

directed to prepare and revise biannually a National Airport System Plan. The Plan must include "the type and estimated cost of airport development considered by the Secretary to be necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics, . . . national defense . . . and to meet the special needs of the postal service."[16/] ADAP established the Airport and Airway Development Program (§14), and created the Airport and Airway Trust Fund (§208) out of which airport development projects are funded through various user fees and taxes.[17/]

ADAP was repealed and reenacted with

[16/] Id., §12(a).

[17/] See generally Pub. L. No. 91-258, Title II, 84 Stat. 219, 236, et seq.

some modifications in 1982 when Congress passed the Airport and Airway Improvement Act of 1982, Pub.L. 97-248, Title V, 96 Stat. 671-702,[18] continuing the National Airport System Plan and its airport improvement program, with funding out of the Airport and Airway Trust Fund.[19]

The language of ADAP and its predecessor the Airport Act, make it clear that only airports having identified development needs are to receive funds through the federal aid program. Only airports are intended to be recipients

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18/ Codified at 49 U.S.C. §2201, *et seq.* (1982).

19/ The court below did not distinguish the 1982 Act from ADAP, and referred only to ADAP in its decision. *Paralyzed Veterans, supra* at 713. For purposes of airport development funding, there is no significant difference between the two statutes.

of these funds. There is no basis in the statute to support the view that airlines were to be the ultimate recipients of these funds. It is significant that Congress separately addressed the well being of airlines in the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.* and the complex economic regulatory scheme overseen by the Civil Aeronautics Board.

That Congress was aware of the purpose and limited effect of the airport aid program "is reflected in the sparse legislative history of [ADAP] itself." cf. *Grove City, supra* note 3, at 1218. The legislative history to ADAP[20] clearly states that the purpose of the

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20/ *See generally* H.R. Rep. No. 91-601, 91st Cong., 1st Sess. (October 27, 1969), to accompany H.R. 14465, *reprinted in* 1970 U.S. Code Cong. & Admin. News 3047.

Act is to provide for the expansion and improvement of the nation's airport and airway system, accord Sellfors v. United States, 697 F.2d 1362, 1366 (11th Cir. 1983), reh'g denied, 703 F.2d. 582, cert. denied, _____ U.S. _____, 104 S.Ct. 3571 (1984), and it is void of any suggestion that the purpose of ADAP is other than to aid airport development.

2. Regulations Implementing ADAP Reflect the FAA's Understanding that the Purpose of the Financial Aid Program is to Aid Airport Development

The Federal Aviation Administration (FAA), to whom the Secretary of DOT delegated responsibility to administer the airport aid program under ADAP, 35 Fed. Reg. 17044 (1970), proposed regulations in 1970, 35 Fed. Reg. 19678, (December 29, 1970), and issued final regulations in 1972, 37 Fed. Reg. 11014

(June 1, 1972). In 1980, the regulations were revised "to simplify the grant process." 45 Fed. Reg. 34784 (May 22, 1980). The regulations are codified at 14 C.F.R. Part 152 (1985).21/

The regulations establish a comprehensive scheme to administer the airport aid program, including the several nondiscrimination requirements with which an airport must comply. 14 C.F.R. §§152.401 - 152.423 (Part 152, Subpart E). The regulations are made applicable to "airport . . . development" under ADAP. 14 C.F.R. §152.1.

Under the Part 152 regulations, in order for an airport development project to be eligible for federal

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21/ All references herein will be to the 1985 edition, unless otherwise noted.

assistance, the project must be for the development of an airport that is safe, useful and useable, or for a facility that increases the safety, usefulness, and useability of an airport. 14 C.F.R. §152.107(a). Additionally, the project must be for "airport development" as defined in §152.3[22/] and as

[22/] 14 C.F.R. §152.3 (1985), in pertinent part, defines "airport development" to mean "(1) Any work involved in constructing, improving, or repairing a public airport or portion thereof, including the removal, lowering, relocation, and marking and lighting or airport hazards, and including navigation aids used by aircraft landing at, or taking off from, a public airport, and including safety equipment required by rule or regulation for certification of the airport under section 612 of the Federal Aviation Act of 1958, and security equipment required of the sponsor by the FAA by rule or regulation for the safety and security of persons or property on the airport, and including snow removal equipment, and including the purpose of noise suppressing equipment, the construction of physical barriers, and landscaping for the purpose of diminishing the effect of aircraft noise on any area adjacent to a public airport."

further identified in mandatory safety standards appended to the Part 152 regulations and incorporated therein by reference. 14 C.F.R. §§152.107(c), 152.11.

The regulations also establish eligibility requirements for airport planning projects, which are limited to developing plans for future airport development. 14 C.F.R. §152.109.

Allowable project costs, for purposes of computing an airport development grant, are limited to costs "necessary to accomplish airport development in uniformity with - (i) the approved plans and specifications for an approved project; and (ii) the terms

of the grant agreement for the project, . . ." 14 C.F.R. §152.203.

The application procedure for an airport development grant is detailed and complex, having both a preapplication and an application requirement. 14 C.F.R. §152.111. In addition to requiring a detailed list of the proposed items of development and an itemized estimated cost of the work involved, the airport sponsor in its preapplication submission must comply with certain procedures established by the Office of Management and Budget, the FAA's environmental assessment policies and procedures, and certain public hearing requirements. 14 C.F.R. §152.111(b). Other requirements are also contained in §152.111(b).

If the preapplication is approved by the FAA Administrator, a tentative

allocation of funds is made. 14 C.F.R. §152.111(d). After receiving notice of the tentative allocation, the project sponsor must then submit an application for federal assistance. 14 C.F.R. §152.111(e). Several requirements, in addition to those contained in the preapplication, are contained in the application procedure. 14 C.F.R. §152.111(f).

Once it is determined a grant will be made, Subpart E of the regulations sets forth the nondiscrimination requirements with which "grantees" must comply. A grantee is defined simply as "the recipient of a grant." 14 C.F.R. §152.403.

The probative value of the interpretation given a statute by the Federal agency whose duty and responsibility it is to administer that statute is

considerable. See, e.g., Consolidated Rail Corporation v. Darrone, 104 S.Ct. 1248, 1255 (1984). The above review of the FAA regulations is sufficient to make make it clear that the FAA considers the purpose of ADAP grants to be limited to providing financial assistance for airport development projects, and that it is only the airport sponsor who is the recipient of such financial assistance.

Nothing in the regulations suggests that airport development funds are to go to airlines for any purpose whatsoever. The regulations limit the use of ADAP funds to approved airport improvement projects. Furthermore, the regulations reflect the FAA's interest in airport safety. The basic criterion for eligibility is that the project enhance the safety of an airport or

further develop an airport already determined to be safe. 14 C.F.R. §152.107(a).

FAA's interpretation is further clarified by its use of the term "grantee." FAA considers only the actual recipient of a grant to be subject to the Part 152 regulations. There is no attempt to bring within the scope of the regulations anyone other than the airport sponsor.

Additional evidence of FAA's understanding of the purpose of ADAP grants is found in its initial regulations issued in 1972. 37 Fed. Reg. 11014 (June 1, 1972), codified at 14 C.F.R. §152 (1979). Appendices A-G to those regulations set out examples of typical eligible projects allowed under Subpart C,

14 C.F.R. §§152.81 - 152.115.[23/] Nowhere in the appendices are found airline development projects or other airline uses of the funds.

C. THERE IS NO STATUTORY RELATIONSHIP BETWEEN ADAP AND §504.

Unlike the facts in Grove City, there is no statutory relationship between the financial assistance rendered to airports under ADAP and the nondiscrimination directive of §504, nor do the two provisions serve a single, overriding purpose, as did the provisions at issue in Grove City.

23/ Eligible projects include: land acquisition, site preparation, runway paving, taxiway paving, aprons, special treatment areas, lighting and electrical work, roads, removal of obstructions, buildings, utilities, parking areas, landscaping, sidewalks, fences, navigational and landing aids, boundary markers, offsite work, maintenance and repair work. 14 C.F.R. §§152.81 - 152.115 (1979).

1. The Application Of §504 Is Specific To The Program Or Activity Receiving Federal Funds.

The primary goal of the Rehabilitation Act is to enhance employment opportunities for the handicapped. Consolidated Rail Corporation, supra at 1254 (note 13). Consequently, in Consolidated Rail, this Court held that the "primary objective" limitation of Title VI would not be read into §504. Id. at 1252. Nevertheless, the Court affirmed the "program specific" nature of §504, and affirmed the judgment of the court of appeals remanding the case to the district court to consider the question of whether the plaintiff had been denied employment in a program receiving federal financial assistance. Id. at 1255-56.

In promulgating the final form of its nondiscrimination regulations, the Civil Aeronautics Board correctly recognized this inherent limitation of §504.[24/] The Board properly recognized that its "jurisdiction" under §504 could reach only those carriers receiving direct subsidies for the mail service and the essential air service programs under §406 and §419 of the Federal Aviation Act of 1952, as amended, 49 U.S.C. §§1376, 1389 (1982).

As noted above, the purpose of ADAP is to provide funds for the necessary development of airports, and the air space system, to serve the public demand for air transportation. Nothing in the statute itself or in the

24/ 47 Fed. Reg. 25936, 25937 (June 16, 1982).

legislative history evinces an intent on the part of Congress that airlines be considered indirect recipients of the financial assistance to airports. Similarly, the FAA regulations implementing ADAP limit the applicable scope to airport sponsors receiving grants. There can be no suggestion that ADAP was "structured to ensure that it effectively supplements"[25/] airline income or activities.

Section 504, on the other hand, is a general directive prohibiting discrimination against the handicapped in furtherence of the purposes of the Rehabilitation Act of 1973. It does not have a direct relationship to ADAP financial assistance programs.

25/ Grove City, 104 S.Ct. at 1217.

Unlike Grove City, there is no basis in the statutory language or legislative history to suggest §504 supports the underlying purpose of the ADAP legislation. Clearly, ADAP and §504 cannot be construed together as serving a single purpose. Application of the §504 prohibition against discrimination must therefore be considered in light of the separate purpose of ADAP and the "program-specific" nature of §504.

Applying the "program specific" limitation of §504 to ADAP grants for specific development projects approved by the FAA, it is clear that airlines are not indirect recipients of ADAP grants. Application of §504 should be limited to the development program for which funds have been authorized and received. Grove City, supra note 3.

North Haven Board of Education v. Bell, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982).

D. EVEN IF AIRLINES COULD BE INDIRECT RECIPIENTS OF FINANCIAL ASSISTANCE THROUGH AIRPORTS, AIRPORT DEVELOPMENT FUNDS ARE NOT TRANSFERRED TO AIRLINES

A fundamental flaw in the court of appeals' analysis is the absence of any evidence indicating an actual transfer of airport development funds to any airline.

In Grove City, the students receiving BEOG's transferred the financial aid they received from the Department of Education to the College by payment of tuition, thus fulfilling the intended purpose for those funds.[26/] Without such a transfer, indirect receipt of these funds is impossible.

26/ See text, supra pp. 5-9.

In the case at bar, no such transfer of funds, by any mechanism, occurs. The money received by the airports is spent directly by the airports on airport improvement projects.[27/] There is no evidence, as there was in Grove City with respect to the student loans, that airlines receive the funds granted initially to airports. There is nothing in the record to support the position that airports merely act as conduits through which airport development funds flow from DOT to airlines.

[27/] As the court below noted, projects undertaken by airports are limited to land acquisition, runway construction, terminal construction, and other similar airport owned projects. Paralyzed Veterans, supra at 714.

II. AIRLINES ARE NOT DIRECT RECIPIENTS OF FINANCIAL ASSISTANCE UNDER ADAP.

A. "COMMERCIAL AIR TRANSPORTATION" IS A FICTITIOUS "PROGRAM OR ACTIVITY" NOT INTENDED TO BE SUBJECT TO §504

To satisfy the analysis required by Grove City, the court of appeals, as a matter of fact and law, found that airlines directly receive federal financial assistance under ADAP by holding that commercial air transportation is an activity jointly carried out by airports and airlines.[28/] Therefore, the court of appeals proceeded to reason that airlines are just as much recipients of ADAP funds granted to airports as are the airports themselves.

The court, however, failed to cite any legal authority for this unprecedented conclusion. Instead, it

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[28/] See text, supra at note 4.

attempted to justify its finding by characterizing the nature of commercial air transportation as "*sui generis*," just as this Court in *Grove City* termed the financial aid program at issue there as "*sui generis*." Such justification by the court of appeals does not withstand careful scrutiny.

It is well recognized that §504 was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq*., and that the legislative history to that act may serve as a guide to understanding §504.[29] This is especially true when it comes to the meaning of "program or activity" as used in §504. The legislative history

[29] *Consolidated Rail Corporation*, *supra*.

to §504 is completely void of any reference to the meaning of this term.[30]

The debate in Congress as to the meaning of "program or activity" as used in Title VI was wide-ranging and is capable of supporting both narrow and broad definitions. *Grove City*, 104 S.Ct. 1211, 1229. Those debates,[31] however, centered on the question of specificity, which this court resolved in *Grove City*. Of primary concern to many members of Congress was whether an entire state program, such as its public school system, could have its funds cut off because of the discriminatory conduct of a particular school or school district. *See Board of Public*

[30] *Supra*, note 19.

[31] *See, e.g.*, 110 Cong. Rec. at 7059, 7063, 7067, 7100-01, 8359-61, 8507-08, and 14330-31 (1964)

Instruction of Taylor County, Florida v.Finch, 414 F.2d 1068, 1077 (5th Cir. 1969), cert. denied 396 U.S. 1021 (1969).

The focus of the debates makes it clear that Congress had in mind well defined, specific programs established, at least in part, with the aid of Federal money. Ferris v. University of Texas at Austin, 558 F.Supp. 536 (D.C.W.D. Tex. 1983). There is no evidence that Congress intended to include combined "hybrid" activities of more than one entity within the scope of "program or activity."

Support for this position is found in the compilation prepared by the U.S. Attorney General identifying those programs which he believed might be affected by Title VI. 110 Cong. Rec. 8359-8361 (April 18, 1964). The

programs listed in that compilation reflect the common usage of "program or activity" as meaning specific programs clearly defined by the underlying grant program. Ferris, supra. As the court in Board of Public Instruction, supra, noted, "[a]ll of these lists refer to particular grant statutes such as those before us, not a collective concept known as a school program or a road program." Board of Public Instruction, supra at 1077 (emphasis added).

As this Court suggested recently in a related context, the reach of §504 is not boundless. Consideration must be given to the practicality of applying §504 in each particular case. "Any interpretation of §504 must . . . be responsive to two powerful but countervailing considerations -- the need to

give effect to the statutory objectives and the desire to keep §504 within manageable bounds." Alexander v. Choate, ___U.S.___, 105 S.Ct. 712, ___, 53 U.S.L.W. 4072, 4075 (1985).

In the case at bar, the broad interpretation of the term "program or activity" endorsed by the court of appeals would result in the boundless and unmanageable application of §504. The number of trades and professions which might be characterized as "intertwined" with a federally funded program creating a hybrid activity is limited only by one's imagination. Examples include legal services (federally funded courts), medical services (medicare and medicaid), real property development (housing and social security assistance), organized

labor (NLRB), and banking (federal mortgage and small business programs); as pointed out by Judge Bork, any business relying on roads constructed or maintained with federal funds would be "intertwined" with a federally funded program, as would farmers, fisherman, and others, who rely upon the National Weather Service.[32/]

Such an extensive and pervasive intrusion into commercial operations of private sector entities clearly was not contemplated by the drafters of §504, nor by the drafters of Title VI. Had Congress intended to reach each and every beneficiary of a federal program, it would have made that intent clear.

32/ Order Denying Suggestion for Rehearing En Banc, Dissenting Opinion, supra note 4.

It did not, and the proper construction of §504 is constrained by the absence of evidence to support such an intent. cf. Alexander v. Choate, supra, at 4075.

CONCLUSION

The historical development of Federal funding of airport development, the language of ADAP, its legislative history and the construction given ADAP by the Federal Aviation Administration all support the conclusion that the underlying purpose of ADAP is to aid airport development by means of grants directly to airports. There is no basis to believe that Congress intended airport development grants to indirectly reach airlines operating at such airports, and indeed the record is void of any evidence to support such a finding. The inevitable conclusion is that air-

lines are not indirect recipients of federal financial assistance within the meaning of §504 and, as a consequence, the Department of Transportation is without authority to issue regulations applicable to airlines implementing §504. The exception to this limitation of DOT's authority is for airlines receiving direct subsidies under §§406 and 419 of the Federal Aviation Act.

Similarly, airlines are not direct recipients of such funds by reason of the integral relationship of airline and airport functions. The concept of such a relationship as constituting a hybrid "program or activity" within the meaning of §504 is an illusion unsupported by the legislative history of §504, or Title VI of the Civil Rights Act of 1964.

This Court should reverse the decision below as it pertains to the authority of DOT to issue regulations which apply to all air carriers using federally assisted airports.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-289

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,
v.

PARALYZED VETERANS OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR INTERNATIONAL AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE SUPPORTING REVERSAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-289

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR INTERNATIONAL AIR TRANSPORT ASSOCIATION AS AMICUS CURIAE SUPPORTING REVERSAL

This brief amicus curiae of the International Air Transport Association is submitted with the consent of petitioner, respondent and intervener pursuant to Supreme Court Rule 36.2.

STATEMENT OF INTEREST

The International Air Transport Association ("IATA") is an organization of 140 air carriers, including substantially all of the scheduled international air carriers pro-

viding air transportation services between the United States and other nations.[1] As an association comprised of domestic and foreign air carriers engaged in the business of transporting passengers to and from the United States, IATA and its members have an interest in the instant litigation. Regulations requiring handicap access impose an economic burden upon and have potential safety implications for commercial air carriers. IATA is thus concerned with the application of handicap access requirements generally to all air carriers that operate within the United States and in particular to foreign air carriers that originate or terminate flights within the United States. Should the decision of the court of appeals be affirmed, IATA's members will be adversely affected.

IATA supports the position of the Department of Transportation ("DOT") that the court of appeals committed error by requiring application of handicap access regulations to all commercial air carriers solely on the ground that such air carriers use federally subsidized airports. In this brief, however, IATA further contends that the court of appeals erred by (1) assuming that it had the power to require DOT to issue regulations under section 504, and (2) fashioning an order which apparently would require foreign air carriers to comply with those regulations.

STATEMENT OF THE CASE

The express purpose of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (the "Act"), was "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. § 701. In accord with this congressional declaration of purpose, the primary focus of the provisions in the Act is to provide federally funded

[1] A list of IATA's members is annexed hereto as the Appendix.

vocational rehabilitation services, federally funded construction of rehabilitation facilities and federally assisted employment opportunities for handicapped individuals. However, a provision so tangential to the purposes of the Act that it appears under the category of provisions entitled "Miscellaneous" has been central in this case. As enacted, that provision, section 504 of the Act, provided that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. The committee reports which accompanied the bill with its passage scantly describe the scope of section 504. The Senate report merely stated that "[t]he bill further includes a provision proclaiming a policy of non-discrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2123. The same report later reiterated that "section [504] prohibits discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance." *Id.* at 2143.

Unlike section 503 of the Rehabilitation Act, which requires the issuance of regulations respecting the employment of handicapped individuals under federal contracts, section 504 imposes no such requirement. *Compare* 29 U.S.C. § 793 *with* 29 U.S.C. § 794. Nor did the legislative history of the Act make *any* reference to mandatory regulations to implement section 504.

In 1976, President Ford issued Executive Order 11,914 which provided for the implementation of section 504 of the Rehabilitation Act. 41 Fed. Reg. 17,871 (1976). The order provided in section 1 that the Secretary of the Department of Health, Education and Welfare ("HEW") coordinate the implementation of section 504. Section 2 of the order required each federal department and agency providing federal financial assistance to "issue rules, regulations, and directives, consistent with the standards and procedures established by [HEW]." Shortly thereafter, a federal district court held that section 504 required HEW to promulgate regulations. *See Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976). The court noted that section 504 "contains no language requiring rulemaking," but relied upon post-enactment legislative reports to support its otherwise unfounded conclusion that Congress intended to require promulgation of implementing regulations under section 504. *Id.* at 924.

The language in a Senate report relied upon by the *Cherry* court stated that:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 [20 U.S.C. § 1681] relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. *It does not specifically require the issuance of regulations or expressly provide for enforcement procedures*, but is clearly mandatory in form, and such regulations and enforcement are intended.
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation and permit a judicial remedy through a private action.

S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (emphasis supplied), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390-91. The other committee reports relied upon by the *Cherry* court were substantially similar. *See* S. Rep. No. 1139, 93d Cong., 2d Sess. 24-25 (1974); H.R. Rep. No. 1457, 93d Cong., 2d Sess. 27-28 (1974). However, as the discussion in each of these reports fails to point out, section 601 of the Civil Rights Act, 42 U.S.C. § 2000d (after which section 504 of the Rehabilitation Act was modeled), is required to be implemented through the promulgation of regulations by section 602 of the Civil Rights Act, 42 U.S.C. § 2000d-1. Likewise, section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681, must be implemented through rulemaking pursuant to section 902 of the Education Amendments, 20

U.S.C. § 1682. In contrast with the Civil Rights Act of 1964 and the Education Amendments of 1972, the Rehabilitation Act of 1973 contains no provision requiring the promulgation of regulations to implement its prohibition of discrimination on the basis of handicap in financially assisted programs or activities.

In response to the *Cherry* decision, HEW issued regulations in January, 1978, which required each agency administering federal financial assistance to promulgate regulations governing non-discrimination on the basis of handicap with respect to the recipients of that federal financial assistance. 43 Fed. Reg. 2132 (1978) (codified as amended at 28 C.F.R. § 41); *see Paralyzed Veterans of America v. C.A.B.*, 752 F.2d 694, 696 (D.C. Cir. 1985) (implying that the promulgation of these regulations was "prodded by an order of our district court"), *cert. granted sub nom. Department of Transportation v. Paralyzed Veterans of America*, —— U.S. ——, 106 S. Ct. 244 (1985).

In November 1978, section 504 was amended to extend its coverage to "any program or activity conducted by any Executive Agency or by the United States Postal Service." *See* Pub. L. No. 95-602, tit. I, §§ 119, 122(d) (2), 92 Stat. 2982, 2987 (1978) (amending 29 U.S.C. § 794). Although the amendment did require these agencies to promulgate regulations prohibiting handicap discrimination, it did not add a general requirement of mandatory implementing regulations under section 504. Section 504, as amended, thus provides that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794.

In June 1979, the Civil Aeronautics Board ("CAB") published proposed section 504 regulations. *See* 44 Fed. Reg. 32,401 (1980) (to be codified at 14 C.F.R. § 382) (proposed June 6, 1979). Pursuant to its authority under section 504 of the Rehabilitation Act and under section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b), CAB proposed to apply the new rules to all "certificated carriers and air taxi operators in their operations with aircraft of more than 30 seats in air transportation." *See id.* at 32,405 (proposed 14 C.F.R. § 382.2). The proposed rules further defined the term "[c]arrier" as "any holder of a certificate of public convenience and necessity issued by the Board authorizing the transportation of passengers and . . . any air taxi operator (as defined in Part 298 of this chapter) . . . ." *Id.* (proposed 14 C.F.R. § 382.3). As the term "certificated" air carrier is used to refer to domestic air carriers which have obtained a certificate of public convenience and necessity rather than foreign air carriers which have received a permit,[2] *see, e.g.*, 14 C.F.R. §§ 241.02, 249.2, 298.2(x) & 382.2(a) (defining certificated air carrier as a domestic air carrier with a certificate of public convenience and necessity issued by CAB), the

[2] Pursuant to the Federal Aviation Act of 1958, domestic air carriers must obtain a *certificate of public convenience and necessity* issued by CAB. 49 U.S.C. § 1371. Foreign air carriers originating or terminating flights within the United States, on the other hand, must receive a *permit* issued by CAB. 49 U.S.C. § 1372.

rules originally proposed by CAB would not have extended to foreign flag carriers. This was in spite of CAB's original proposal to issue these regulations under section 404(b) of the Federal Aviation Act of 1958, which, prior to its repeal, explicitly gave CAB authority to regulate against discrimination by foreign air carriers. *See* 49 U.S.C. § 1374(b), *terminated* by 49 U.S.C. § 1551 (a)(2)(B) & (4)(C) (effective with respect to passenger transport on Jan. 31, 1983).

In November 1980, President Carter issued Executive Order 12,250, revoking Executive Order 11,914 and transferring the authority for overseeing the implementation of section 504 from HEW to the Department of Justice ("DOJ"). *See* Exec. Order No. 12,250, 3 C.F.R. 298, 300 (1981). Similar to the previous order, Executive Order 12,250 required that "[e]ach Executive agency responsible for implementing a nondiscrimination provision of a law covered by this Order shall issue appropriate implementing directives (whether in the nature of regulations or policy guidance)." Exec. Order No. 12,250, § 1-402, 3 C.F.R. at 300 (1981).

In June 1981, a federal district court, apparently unaware that Executive Order 11,914 had been superseded, held that nine agencies, including CAB, were required pursuant to Executive Order 11,914 to promulgate regulations to implement section 504. *Paralyzed Veterans of America v. Smith*, 27 Empl. Prac. Dec. (CCH) ¶ 32,277 at 22,933, 22,934 (C.D. Cal. 1981). The court also noted that the Senate Labor Committee's 1974 report accompanying what the court erroneously described as an "amendment" to section 504[3] "stat[ed], *inter alia*, that implementing regulations should be issued by [HEW]

[3] In fact, however, there were no amendments to section 504 until 1978. *See* 29 U.S.C.A. § 794 (Historical note). The "amendment" to which the court referred was a change in the definition of "handicapped individual." *See* Rehabilitation Act Amendments of 1974, § 111(a) (amending 29 U.S.C. § 706(7)).

and that the conferees 'fully expect that HEW's Section 504 regulations should be completed by the close of the year.' " *Id.*

In August 1981, 28 C.F.R. § 41 was amended to conform to Executive Order 12,250's transfer of oversight authority from HEW to DOJ. Thereafter, in June 1982, CAB promulgated rules with respect to handicap discrimination. *See* 14 C.F.R. § 382. However, because section 40(a) of the Airline Deregulation Act of 1978 provided that section 404(b) of the Federal Aviation Act would cease to be in effect on January 1, 1983, to the extent it related to interstate and overseas air transportation of persons, 49 U.S.C. § 1551(a)(2)(B), CAB perceived itself not only as no longer having authority to regulate air carriers not receiving direct subsidies but as under a congressional mandate to limit its regulation of such air carriers. Thus, CAB, instead of promulgating detailed regulations applicable to all domestic air carriers, only issued general policy directives with respect to nonsubsidized air carriers, while limiting application of its detailed regulations to directly subsidized air carriers. In addition, as in the originally proposed rules, the applicability of the section 504 regulations was limited to "all certificated air carriers and . . . all commuter air carriers that receive subsidy or compensation for losses directly or through another recipient from the Board under Sections 406 or Section 419(a)(5), (a)(7), or (b)(6) of the Federal Aviation Act of 1958, as amended." 14 C.F.R. § 382.2(a). Again, the regulations by their terms did not apply to foreign flag carriers.

In response to the implementation of these regulations, plaintiffs brought the present action. After extensive hearings and rehearings, the court of appeals held that section 504 did apply to all air carriers, even those which did not receive direct federal financial assistance, on the ground that they use federally subsidized airports. *See Paralyzed Veterans of America v. C.A.B.*, 752 F.2d at 712-15.

Furthermore, although the rules originally proposed and those finally enacted never purported to apply to foreign air carriers, and although none of the parties has ever briefed or discussed the issue in any of the hearings before the court of appeals or CAB, the order issued by the court of appeals requires *all* commercial air carriers, ostensibly including foreign air carriers, to comply with the regulations it wants CAB to promulgate. *See id.* at 725.

SUMMARY OF ARGUMENT

IATA prays that this Court reverse the order of the court of appeals because that order is based upon the erroneous premise that the court of appeals had authority to require that regulations be promulgated to implement section 504. The plain meaning of the language in section 504 itself, together with the legislative history of section 504, cannot reasonably be construed to require the promulgation of regulations to implement section 504. Further, because the executive order delegating authority to enforce section 504 does not require the promulgation of the sort of detailed regulations required by the court of appeals, the regulations already promulgated by CAB fully complied with that order. Because two erroneous district court decisions, holding that section 504 requires implementing regulations, compelled HEW to promulgate and DOJ to keep in force regulations requiring other federal agencies to promulgate regulations to implement section 504, DOJ's regulations should not be considered binding on DOT until the executive branch has had the opportunity to reconsider those regulations in light of this Court's review of the merits of the two district court opinions.

Regardless of whether section 504 requires regulations to be promulgated and regardless of whether it applies only to directly subsidized air carriers or to all domestic air carriers, the court of appeals erroneously applied section 504 to foreign air carriers. The Rehabilitation Act was not intended to be applied extraterritorially and was not intended to apply to aliens who are temporarily within the United States. Moreover, application of section 504 to foreign air carriers is precluded by United States treaty obligations to provide navigation facilities and airports to foreign air carriers and to respect the flight safety decisions of foreign governments.

ARGUMENT

I. The Court of Appeals Lacks Judicial Power to Require DOT to Issue Regulations Under Section 504.

This Court has established that an administrative agency may choose to enforce a statute either by promulgating regulations or by proceeding through ad hoc adjudication. *NAACP v. Federal Power Commission*, 425 U.S. 662, 668 (1976); *NLRB v. Bell Aerospace Co.* 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Because there is no statutory or executive mandate to the contrary in the instant case, DOT is thus not required to promulgate regulations to execute section 504.

A. Section 504 Itself Does Not Require Regulations.

In determining whether section 504 requires DOT to promulgate regulations,[4] the Court should look to the plain meaning of the language used in that statute. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-70

[4] The importance of the issue whether section 504 requires regulations is illustrated by the fact that no regulations were ever required or promulgated under 49 U.S.C. § 1374, which clearly applied to all air carriers operating in the United States, and which had been interpreted, inter alia, to prohibit discrimination against handicapped individuals. *See Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984). Thus the issue whether airlines are subsidized is only important after one has first resolved the issue whether section 504 requires regulations.

(1982). "The starting point in every case involving construction of a statute is the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Thus, although the similarity between section 504 of the Rehabilitation Act and sections 601 of the Civil Rights Act and 901 of the Education Amendments does mean that interpretations of the latter two provisions may be helpful in interpreting the former provision, it is just this similarity which lends significance to the differences between these provisions. In comparing Title IX of the Education Amendments to Title VI of the Civil Rights Act, this Court reasoned that:

> The meaning and applicability of Title VI are useful guides in construing Title IX . . . only to the extent that the language and history of Title IX do not suggest a contrary interpretation. Moreover, whether § 604 clarified or altered the scope of Title VI, it is apparent that § 601 alone was not considered adequate to exclude employees from the statute's coverage. If Congress had intended that Title IX have the same reach as Title VI, therefore, we assume that it would have enacted counterparts to both § 601 and § 604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them. *See Lorillard v. Pons*, 434 U.S. 575, 584-585, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978).

North Haven Board of Education v. Bell, 456 U.S. 512, 529-30 (1982). Similarly, the lack of an express provision in the Rehabilitation Act requiring that section 504 be enforced by the promulgation of regulations, in contrast with the Civil Rights Act and Education Amendments, which do contain such provisions, can only reasonably be interpreted to mean that Congress did not intend to require regulations.

On its face, section 504 merely prohibits discrimination against handicapped individuals under any program or activity receiving federal financial assistance or conducted by an Executive agency or the Postal Service. Section 504 does not mandate the promulgation of regulations to govern the activities of federally assisted programs not conducted by an Executive agency or by the Postal Service. Indeed, the 1978 extension of section 504 to programs or activities conducted by Executive agencies or by the Postal Service and revision of section 504 to require Executive agencies to promulgate regulations necessary to implement the extension of section 504, *see* Act of November 6, 1978, Pub. L. 95-602 tit. I, §§ 119 & 122(d)(2), 92 Stat. 2982, 2987, was carefully tailored so as not to require the promulgation of regulations to govern the broader range of federally assisted programs covered by section 504. Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L. Rev. 401, 412 n.26 (1984).

With respect to the regulation of airlines in particular, it is noteworthy that a recently lapsed provision in the Federal Aviation Act of 1958 that prohibited air carriers from engaging in any unjust discrimination or any undue or unreasonable prejudice against any individual, *see* 49 U.S.C. § 1374(b) (discrimination prohibition), *terminated by* 49 U.S.C. § 1551(a)(2)(B) & (4)(C) (effective with respect to passenger transport on January 1, 1983), was never held to require CAB to promulgate regulations. Moreover, section 14 of the Civil Aeronautics Board Sunset Act of 1984, 49 U.S.C. § 1304, envisions DOT choosing whether to use ad hoc adjudication or promulgate regulations to enforce the prohibition of discrimination against handicapped persons. Specifically, section 14 provides that:

> the Board or the Secretary, as the case may be, shall consult with the Architectural and Transportation Barriers Compliance Board established under section 792 of Title 29, prior to issuing or amending any *order, rule, regulation, or procedure* that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped persons.

49 U.S.C. § 1304 (emphasis supplied).

The two district court opinions holding that section 504 requires the promulgation of regulations are clearly erroneous and should be overruled. *See Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976) (requiring HEW to implement section 504 by promulgating regulations); *Paralyzed Veterans of America v. Smith*, 27 Empl. Prac. Dec. (CCH) ¶ 32,277 (C.D. Cal. 1981) (requiring nine agencies, including CAB, to issue section 504 regulations). The reliance of both decisions on language in committee reports accompanying 1974 amendments to the Rehabilitation Act of 1973 is misguided. The *Cherry* court cites *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969), for the proposition that subsequent congressional declarations of intent are important in statutory interpretation. However, *Red Lion* applied the proposition in the context of subsequent legislation. *See id.* The district court's reliance on post-enactment committee reports in the interpretation of a statute usurps the legislative function. Only through the formality of statutory enactment can a legislature express its will and only through the formality of statutory amendment can that will, once expressed, be modified or overriden. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L.J. 515, 517, 523 (1982); *see* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 810 (1983); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977) ("Reliance on legislative history in divining the intent of Congress is as has often been observed, a step to be taken cautiously"). In any event, the committee reports relied upon by the district courts concede that section 504 "does not specifically require the issuance of regulations or expressly provide for enforcement procedures." H.R. Rep. No. 1457, 93d Cong., 2d Sess. 27 (1974); *see also* S. Rep. No. 1139, 93d Cong., 2d Sess. 24, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390. "When confronted with a statute which is plain and unambiguous on its face, [the Supreme Court]ordinarily do[es] not look to legislative history as a guide to its meaning." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978) (citing *Ex parte Collett*, 337 U.S. 55, 61 (1949)). Because congressional intent should be inferred from statutory language whenever possible to reduce the risk that legislative aides will sprinkle language throughout committee reports that are not voted upon by Congress, and indeed are sometimes not even read by committee members, in order to support interpretations of statutes which go beyond the actual bills passed by Congress, *see Hirschey v. FERC*, No. 82-2170 (D.C. Cir. Nov. 15, 1985) (Scalia, J., concurring) (available on Lexis, Genfed library, Cir. file) ("I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committe-staff prescription"), the Court should refuse to read a requirement of mandatory implementing regulations into section 504. This is especially true in light of the frank admission in the 1974 committee reports that the language of section 504 does not require regulations and in light of other similar statutes both in this Act and in previous acts which indicate that Congress will require regulations when it so intends.

B. Executive Order 12,250 and 28 C.F.R. Part 41 Do Not Empower The Court to Require Regulations.

Executive Order 12,250 does not require CAB or DOT to promulgate detailed regulations such as those required by the court of appeals. It mandates that the relevant agencies "shall issue appropriate implementing directives (whether in the nature of regulations or policy guidance)." Exec. Order 12,250, § 1-402. The distinction between "regulations" and "policy guidance" made in the order recognizes that the relevant agency will be better able to judge whether detailed regulations or general declarations of policy, to be enforced through declaratory order proceedings, would be the more appropriate means of implementing the statute. Although CAB believed that section 504 only applied to directly subsidized air carriers, and therefore promulgated detailed regulations only with respect to such air carriers, the resolution by the Court of the scope of section 504 is immaterial for purposes of whether CAB complied with Executive Order 12,250.[5] CAB issued detailed regulations with respect to directly subsidized air carriers because the agency perceived itself as under a statutory mandate to do so. The broader provisions in 14 C.F.R. § 382, subpt. A, which CAB has made applicable to all domestic air carriers, satisfy Executive Order 12,250's requirement of an implementing directive in the nature of policy guidance. Thus, even if the Court were to find that all air carriers are subject to section 504, CAB's directives in 14 C.F.R. § 382, subpt. A, comply with the order. DOT may indeed decide, that because it is not under a statutory mandate to issue detailed regulations, that increased access to air transportation for handicapped individuals is a goal which is better achieved through ad hoc adjudication pursuant to a general mandate against discrimination rather than through the promulgation of detailed regulations. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. at 294; *SEC v. Chenery Corp.*, 332 U.S. at 202-03; *British Caledonian Airways Ltd. v. C.A.B.*, 584 F.2d 982, 985-88 (D.C. Cir. 1978) (upholding CAB practice of using declaratory order proceedings, rather than exclusively rulemaking, to enforce statutory mandates).

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[5] An executive order may delegate both authority and responsibility. To the extent that it delegates authority rather than responsibility, an executive order creates no greater affirmative responsibility to exercise that authority than the official who delegated the authority already had. An executive order may create responsibility if it delegates authority and requires the delegate to exercise that authority. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, ——, 104 S.Ct. 1621, 1630 (1984); *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Vitarelli v. Seaton*, 359 U.S. 535, 544-47 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954).

Although Executive Order 12,250 does not require regulations, regulations promulgated by HEW (and now deemed to have been promulgated by DOJ under Executive Order 12,250), *do require* agencies under DOJ's supervision to promulgate regulations in order to implement section 504. Nevertheless, HEW's regulations cannot be viewed as voluntarily promulgated. Rather, these regulations were issued after a court order that HEW was required by statute to promulgate regulations. *See Cherry v. Mathews*, 419 F. Supp. at 927; *see also Paralyzed Veterans of America v. C.A.B.*, 752 F.2d at 696 & n.6. After HEW's original regulations were redesignated and amended in August 1981 to shift the authority thereunder from HEW to DOJ, a second court held that the statute required those agencies under DOJ's supervision to issue regulations. *See Paralyzed Veterans of America v. Smith*, 27 Empl. Prac. Dec. (CCH) ¶ 32,277. Thus, although the original delegation of authority by the President did not require regulations to be promulgated, subsequent court cases holding that section 504 required regulations to be promulgated resulted in the issuance of regulations by HEW which required other agencies to promulgate regulations. Due to the tainting of the executive process by these two incorrectly decided district court cases, the

Court cannot presume that HEW's regulations manifest the same type of Executive self-regulation which would require CAB or DOT to issue regulations as that in *EEOC v. Shell Oil Co.*, 466 U.S. at ——, 104 S.Ct. at 1630, *United States v. Nixon*, 418 U.S. at 695-96, *Vitarelli v. Seaton*, 359 U.S. at 544-47, *Service v. Dulles*, 354 U.S. 363, or *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. at 265-67. The Court should therefore reverse the order of the court of appeals, which was based on the erroneous premise that CAB was required to promulgate regulations under section 504, and remand the case to DOT for a determination whether DOJ still intends to require DOT to promulgate regulations in light of reversal of the two district court decisions which had previously required regulations to be promulgated under the statute. *Cf. Independent U.S. Tankers Owners Committee v. Lewis*, 690 F.2d 908, 917 (D.C. Cir. 1982) ("since [the Maritime Administration] was not legally obliged to limit its discretion through rulemaking at all, it is difficult to find *legal* fault with its failure to go further than it did").

II. The Court of Appeals Erroneously Applied Section 504 to Foreign Air Carriers.

Although neither the regulations originally proposed nor those finally promulgated by CAB extended handicap access requirements to foreign air carriers, the order issued by the court of appeals ostensibly applies handicap access requirements "to all commercial air carriers." *See Paralyzed Veterans of America v. C.A.B.*, 752 F.2d at 725. The absence of any discussion whether section 504, if not limited in application to directly subsidized air carriers, is thereby applicable to foreign air carriers makes it unclear whether the court of appeals actually intended its order to require regulations which would apply to foreign air carriers. However, because such an extension of section 504 regulations to foreign carriers would have significant international repercussions, the Court should make it clear that the Rehabilitation Act does not apply to foreign carriers.

Section 504 should not be extended to foreign air carriers because the Rehabilitation Act was not intended to apply to United States citizens located outside the territorial United States or to alien citizens temporarily located within the United States. Neither the plain wording of section 504 nor its legislative history indicates that it was intended to apply to foreign air carriers. Moreover, United States treaty obligations to provide airport facilities and air traffic control services in exchange for the reciprocal provision of such facilities and services by other nations and to respect the safety decisions of other nations militate against interpreting section 504 broadly enough to apply to foreign air carriers.

A. The Rehabilitation Act Was Not Intended to Apply to Foreign Air Carriers.

Although American law clearly governs the navigational and landing operations of foreign aircraft, the internal operations of foreign aircraft, including passenger seating and boarding policies, are governed by the law of a foreign carrier's flag state. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17-22 (1963) (internal affairs of a ship governed by law of flag state); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142 (1957) (same); *Wildenhus's Case (Mali v. Keeper of the Common Jail)*, 120 U.S. 1, 12 (1887) (same). The issue is not one of jurisdictional power, for the United States clearly would have the power to regulate such activities. Rather, the issue is one of international comity, in which the Court should recognized the venerable principle that unless a clear statutory provision can be found to provide such jurisdiction, the Court should assume that the United States has exercised its discretion not to regulate such activities. *Cf. Foley Bros.*,

Inc. v. Filardo, 336 U.S. 281, 285 (1949) ("The cannon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions."); *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

The significance of maintaining international harmony by recognizing general principles of comity in the context of regulating foreign air carriers is evidenced by this Court's decision in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). In the *Waterman* case this Court held that

> [O]rders of the [Civil Aeronautics] Board as to certificate for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review at anytime before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.

Id. at 114. Indeed, the Court noted in the *Waterman* case that Congress had treated the problems involved in establishing foreign air routes as of greater international delicacy and strategic importance than those involved in routes for water carriage. *Id.* at 106-08.

The regulatory and financial assistance scheme embodied in the Rehabilitation Act evinces an intent to apply domestically. *See, e.g.*, 29 U.S.C. § 707 (state allotment formula) & § 720 (federal grants to states). In particular, section 504 provides that its discrimination prohibition will apply to benefit each "otherwise qualified handicapped individual in the United States." 29 U.S.C. § 794. Thus, not only are the general purposes of the Act limited to domestic application, but section 504 by its very terms is

limited to individuals *within* the United States. Similar statutes have been held not to apply to United States citizens while outside the United States or to foreign nationals temporarily within the United States. *See, e.g., Foley Bros, Inc.*, 336 U.S. 281 (Federal Eight Hour Law did not apply to contract between United States and private contractor for construction work in foreign country); *McCullough*, 372 U.S. 10 (National Labor Relations Act did not apply to foreign flag vessels while in U.S. ports); *Benz*, 353 U.S. 138 (Labor Relations Management Act of 1947 did not cover dispute between foreign ship and its foreign crew while in U.S. port).

There is simply no support for interpreting the Act as regulating foreign air carriers while in the United States with respect to their treatment of United States citizens. The non-applicability of section 504 after foreign air carriers leave United Sates air space, together with the absence of any requirement that foreign points of origination or termination provide handicap access facilities, vitiates any benefit which would otherwise be obtained from such an application of the statute.[6] *See Air Line Stewards and Stewardesses Association v. Northwest Airlines, Inc.*, 267 F.2d 170 (8th Cir. 1959) (Railway Labor Act only regulated employment practices with respect to flights within the United States), *cert. denied*, 361 U.S. 901 (1959); *Air Line Dispatchers Association v. National Mediation Board*, 189 F.2d 685 (D.C. Cir. 1951) (same), *cert. denied*, 342 U.S. 849 (1951); *Hodgson v. Union de Permisionarios Circulo Rojo, S. de R. L.*, 331 F. Supp. 1119 (S.D. Tex. 1971) (Fair Labor Standards Act did not extend to employees of Mexican

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[6] Foreign air carriers operating pursuant to a permit issued under 49 U.S.C. § 1372 are only authorized to originate or terminate flights within the United States. They are not permitted to originate *and* terminate the same flight within the United States. Thus, all foreign air carrier flights must either originate or terminate outside the United States.

bus company performing only minor parts of their duties within United States).

B. United States Treaty Obligations Preclude Reading Section 504 to Apply to Foreign Air Carriers.

The Federal Aviation Act specifically provides that:

> In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country . . . .

49 U.S.C. § 1502. With respect to whether section 504 should apply to foreign air carriers, the well-established maxim of statutory construction is that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)). "Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern." *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, 356 (5th Cir. 1981) (citing *McCulloch*, 372 U.S. at 21), *vacated on other grounds*, 457 U.S. 1128 (1982). Indeed, the application of domestic law in a manner which conflicts with existing treaty obligations can impair the political objectives of the United States in renegotiating those treaty obligations. *See British Airways Board v. Port Authority of New York*, 558 F.2d 75, 86 n.4 (2d Cir. 1977) (controversy

over landing rights of the Concorde "contributed significantly to the difficulties encountered in renegotiating the Bermuda Agreement"). This cripples efforts to effect recently expressed congressional intent that the United States engender "opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away." 49 U.S.C. § 1502(b)(8).

1. Allowing foreign flag carriers access to United States navigation facilities and airports fulfills treaty obligations to foreign governments.

The United States has undertaken certain treaty obligations to provide airports and air traffic control services to foreign air carriers as a quid pro quo for the provision of similar facilities and services by foreign nations. *See* Convention on International Civil Aviation (the Chicago Convention), *entered into force* April 4, 1947, 61 Stat. 1180, T.I.A.S. No. 1591. Article 15 of the Chicago Convention provides that every airport and all navigation facilities which are available to national aircraft of a contracting nation shall be available under uniform conditions to the aircraft of all other contracting nations. Article 28(a) imposes an obligation on each contracting nation, so far as it may find practicable, to provide airports, radio services, meteorological services and other air navigation services in its territory to facilitate international air navigation. Article 71 provides that if a contracting nation requests, the Council (a body established as part of the International Civil Aviation Organization formed by the Chicago Convention) may agree to provide, maintain and administer any or all of the airports and other air navigation facilities required in that nation's territory. Thus, the Chicago Convention obligates the United States to provide airports and air navigation facilities to foreign air carriers and, in the event that the

United States is unable financially to provide such facilities and services, the Chicago Convention provides an alternative mechanism for making such facilities available to foreign air carriers. It is not, therefore, a subsidy upon which Congress may impose conditions.

In addition to the multilateral Chicago Convention, the United States is also party to numerous bilateral agreements between the United States and each country in which United States air carriers operate or which has air carriers which originate or terminate flights in the United States. *See generally* Form of Alternate Bilateral Air Transport Agreement in Use by the United States since 1982, *reprinted in* 3 Av. L. Rep. (CCH) ¶ 26,308 (1985). It is implicit in those bilateral agreements that each country will provide to the air carriers of the other country an adequate air traffic control system as well as necessary airport facilities and services. There would be no basis for such bilateral agreements if the United States did not extend to foreign carriers its air traffic control system and airport facilities and services. Thus, the air traffic control and airport services provided by other governments to United States international commercial air carriers do not constitute financial assistance to those air carriers. Conversely, international foreign air carriers do not receive financial assistance from the United States by virtue of the air traffic control system and airport facilities and services made available to them as part of their bilateral agreements with the United States.

2. *Treaty obligations to respect flight safety decisions of foreign governments preclude the imposition of handicap access regulations which interfere with such safety decisions.*

The Chicago Convention established a system of international air transportation in which each air carrier's flag state fixes and regulates safety standards for airplanes, qualifications for pilots and crew and procedures

for the safety and comfort of passengers. *See* Chicago Convention arts. 17 (aircraft have nationality of nation in which they are registered), 19 (registration of aircraft shall be made according to laws of flag state), 31 (aircraft engaged in international navigation shall be provided with certificate of airworthiness issued by flag state), 32 (pilot and crew of aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued by flag state of aircraft), 33 (certificates of airworthiness, certificates of competency, and licenses issued by aircraft's flag state shall be recognized as valid by other contracting states if meet minimum standards established pursuant to Convention), 35 (a contracting state, in exercise its right to prohibit the carriage in or above its territory of articles by foreign air carriers, may not interfere with the carriage or use on aircraft of apparati necessary for operation or navigation of the aircraft or safety of personnel or passengers), and 37 (each contracting state undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation). With respect to these treaty obligations, a ban on foreign DC-10 flights within United States air space was held to violate Article 33 of the Chicago Convention. *See British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981).

There are significant foreign policy reasons for respecting the safety decisions of foreign air carriers or foreign governments with respect to flight safety policy:[7]

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[7] Although no specific provision of the Chicago Convention requires contracting states to respect the *safety procedures* of the contracting parties as opposed to merely certificates of airworthiness and licenses granted to pilots, the Court should embrace this broader interpretation of the treaty in order to effect its purposes. "[W]here a provision of a treaty fairly admits of two constructions,

[W]hat is perceived as a legitimate, economically desirable measure in one country may be considered unfair or discriminatory by another country. The maintenance of rigid national positions easily may lead in practice to an escalation of a conflict which can affect provision of adequate transportation services to the public.

The escalation and confrontation of unilateral protective or retaliatory measures is an undesirable prospect. . . .

. . .

The assertion of national criteria in this uncertain area can lead only to friction in international air relations and may have a disrupting effect on air services. Therefore, such unilateral corrective measures should give way to international cooperation of different types and forms as appropriate, through consultations or agreements, bilateral or multilateral, however arduous this cooperative approach may appear or prove to be.

Gertler, *Nationality of Airlines: A Hidden Force in the International Air Regulations Equation*, 48 J. Air L. & Com. 51, 82, 88 (1982) (footnotes omitted) (criticizing economic protectionism). Indeed, although the Federal Aviation Administration's air traffic and general operating rules generally apply to all air carriers operating within the United States, including foreign air carriers, those rules which relate to internal safety procedures and

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one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." *Zschernig v. Miller*, 389 U.S. 429, 456-57 (1968) (quoting *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940)); *see also Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924); *De Geofroy v. Riggs*, 133 U.S. 258, 10 S. Ct. 295, 298 (1890); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1880); *Shanks v. DuPont*, 28 U.S. 242, 248 (1830).

equipment and passenger comfort during flight are limited to United States flag carriers. *See, e.g.*, 14 C.F.R. §§ 91.14 (use of safety belts), 91.32(b) (supplemental oxygen), 91.197 (smoking and safety-belt signs), 91.199 (passenger briefing), 91.200 (shoulder harnesses), 91.201 (carry-on baggage), 91.203 (carriage of cargo) & 91.215 (flight-attendant requirements).

The conflict between treaty obligations to respect flight safety decisions of foreign air carriers and foreign governments and the coercive effect of section 504 regulations as applied to foreign air carriers is unavoidable. Requiring airlines to allow partially mobile passangers to sit in any seat they choose, to permit handicappd passengers to bring certain apparati such as wheelchairs and canes on board, and other similar regulatory requirements involve sensitive decisions which balance safety risks against the benefit to handicapped individuals and the public generally from increasing the access of handicapped individuals to air transportation. *See Paralyzed Veterans of America v. C.A.B.*, 752 F.2d at 702-03 & n.63 ("the Board's decisionmaking . . . balanced the felt necessities of the handicapped with the requirements of the airlines for flexibility and the need for deference to the expertise of agencies that are charged more directly with ensuring the safety of air transportation"). Regardless of whether this Court believes the weighing of such factors has been correct or incorrect, United States treaty obligations preclude the Court from imposing CAB's balancing of safety and nonsafety factors upon foreign air carriers. To do so would preempt decisions of foreign air carriers and their governments respecting flight safety policies. For example, a particular foreign air carrier may not allow canes and wheelchairs to be brought on board airplanes or may require people of impaired mobility to sit in a particular area of the airplane. Both of these determinations would be preempted by the section 504 regulations which have been proposed.

While this Court may feel that imposing handicap access requirements on an international basis is a desirable and virtuous goal, principles of international comity and existing United States treaty obligations preclude the Court from accomplishing that goal through judicial fiat. Rather, the determination is one for the political branches to make. *See McCullough*, 372 U.S. at 21-22. Indeed, such solutions are best achieved through international agreements and cooperation rather than unilateral actions such as ordering the promulgation and application of regulations under section 504. In this regard, the Chicago Convention states in article 12 that "[e]ach contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention."

CONCLUSION

The judgment of the court of appeals should be reversed. Alternatively, the instructions of the court of appeals remanding the case to DOT should be modified to inform DOT that section 504 does not require DOT to promulgate any regulations and that DOT should inquire of DOJ whether DOJ still intends to require such regulations in light of the outcome of this decision. In addition, the remand instructions should indicate that any regulations which are promulgated pursuant to section 504 may not apply to foreign air carriers.

Respectfully submitted,

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December 19, 1985

APPENDIX

MEMBERSHIP OF INTERNATIONAL AIR TRANSPORT ASSOCIATION

Active Members: 120
Associate Members: 20
Total: 140

ACTIVE MEMBERS

Aer Lingus Teoranta
Aerolineas Argentinas
Aeronaves de Mexico S.A. (AEROMEXICO)
Aerovias Nacionales de Colombia S.A. (AVIANCA)
Air Afrique
Air Algerie
Air Botswana (Pty.) Ltd.
Air Burundi
Air Canada
Air France
Air Gabon
Air Guinee
Air-India
Air Malawi Limited
Air Malta Company Limited
Air Mauritius
Air New Zealand Limited
Air Niugini
Air Pacific Limited
Air Tanzania Corporation
Air Tungaru Corporation
Air U.K.
Air Vanuatu Limited
Air Zaire
Air Zimbabwe Corporation
ALIA—The Royal Jordanian Airline
Alisarda Linee Aeree della Sardegna
Alitalia—Linee Aeree Italiane S.p.A.
American Airlines Inc.

Bakhtar Afghan Airlines Co. Ltd.
Austrian Airlines
Birmingham Executive Airways PLC
British Airways
British Caledonian Airways Ltd.
British Mid~~land~~ ~~A~~irway~~s Limited~~
Cameroon Airlines
Caribbean Air Cargo Company Ltd.
Ceskoslovenske Aerolinie (CSA)
Compania Mexicana de Aviacion S.A. de C.V.
Continental Air Lines, Inc.
CP Air
Crossair
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Cyprus Airways Limited
Democratic Yemen Airlines (ALYEMDA)
Deutsche Lufthansa A.G.
DirectAir, Inc.
Eastern Air Lines Inc.
Egyptair
El Al Israel Airlines Limited
EMIRATES
Empresa Consolidada Cubana de Aviacion
Empresa Ecuatoriana de Aviacion
Empresa de Transporte Aereo del Peru—AeroPeru
Ethiopian Airlines Corporation
Finnair Oy
Flying Tiger Line Inc.
P.T. Garuda Indonesian Airways
Ghana Airways Corp.
Gulf Air Company G.S.C.
Haiti Air
IBERIA, Lineas Aereas de Espana S.A.
Icelandair
Indian Airlines
Inex Adria Airways

Iran Air, The Airline of the Islamic Republic of Iran
Iraqi Airways
Jamahiriya Libyan Arab Airlines
Japan Air Lines Co. Limited
Jugoslovenski Aerotransport (JAT)
Kenya Airways Ltd.
KLM Royal Dutch Airlines
Kuwait Airways Corporation
Lesotho Airways Corporation
LAM—Linhas Aereas de Mocambique
Linea Aerea del Cobre S.A. (LADECO)
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Lloyd Aereo Boliviano S.A. (LAB)
MALEV—Hungarian Airlines
Middle East Airlines Airliban
NFD (Nurnberger Flugdienst) GmbH & Co. KG
Nigeria Airways Limited
Nippon Cargo Airlines (NCA)
Olympic Airways S.A.
Pakistan International Airlines Corp.
Pan American World Airways, Inc.
Philippine Airlines Inc.
Polskie Linie Lotnicze (LOT)
Polynesian Airlines Ltd.
Primeras Lineas Uruguayas de Navegacion Aerea (PLUNA)
Qantas Airways Limited
Quebecair
Royal Air Maroc
Royal Swazi National Airways Corporation Ltd.
SABENA (Societe anonyme belge d'exploitation de la navigation aerienne)
Saudi Arabian Airlines Corp. (SAUDIA)
Scandinavian Airlines System (SAS)
Sierra Leone Airlines Limited
Solomon Islands Airways Limited (SOLAIR)

Somali Airlines
South African Airways
Sudan Airways
Swiss Air Transport Co. Limited (SWISSAIR)
Syrian Arab Airlines
TAAG—Linhas Aereas de Angola (Angeola Airlines)
TAP—Air Portugal
Tower Air Inc.
Trans-Mediterranean Airways S.A.R.L. (TMA
Trans World Airlines Inc.
Trinidad and Tobago (BWIA International) Airways Corp.
Tunis Air
Turk Hava Yollari A.O. (Turkish Airlines)
UTA (Union de Transports Aeriens)
United Airlines
VARIG S.A. (Viacao Aerea Rio-Grandense)
Venezolana Internacional de Aviacion S.A. (VIASA)
Virgin Atlantic Airways
YEMENIA Yemen Airways
Zambia Airways Corporation Ltd.

ASSOCIATE MEMBERS

Air Liberia
Air Queensland Ltd.
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Braathens S.A.F.E.
Commercial Airways (Pty.) Ltd.
Douglas Airways Pty. Limited
Eastern Provincial Airways Limited
East-West Airlines Limited
Kendell Airlines
Mid Pacific Airlines Inc.
Mount Cook Airlines
Namib Air (Pty.) Ltd.
Newmans Airways Limited
TALAIR Pty. Limited

Trans Australia Airlines
Transbrasil S.A. Linhas Aereas (Trans Brasil)
Trans-Jamaican Airlines Limited
Vayudoot Limited
Viacao Aerea Sao Paulo S.A. (VASP)

AMICUS CURIAE

BRIEF

(7)

No. 85-289

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-289

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as amicus curiae in support of the petitioners.[1]

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[1] The consents of all parties have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

EEAC members are either employers or associations of employers that could be affected by the decision in this case. Many employers have not accepted federal funding for any of their activities. Until now, those employers could assume that they were not subject to the provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination against the handicapped only in programs and activities receiving federal financial assistance. The decision of the Court of Appeals, however, if affirmed, would expand greatly the number of companies that could be found to be "federally assisted" entities, and thus would cause considerable uncertainty among employers as to the ultimate extent of coverage of Section 504. Other federal funding statutes applicable to private employers also could be affected by the court's decision as to what constitutes federal financial assistance.

See Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975, and note 7 below. Accordingly, EEAC's members have a substantial interest in the issue here before the Court, that is, whether Section 504 applies to airlines that receive no federal subsidies, but that use the facilities of federally assisted airports and the services of the federally provided air traffic control system.[2]

STATEMENT OF THE CASE

Petitioners United States Department of Transportation ("DOT") and Federal Aviation Administration ("FAA") appeal from a decision of the United States Court of Appeals for the District of Columbia Circuit, invalidating portions of final regulations issued by the Civil Aeronautics Board ("CAB") under Section 504 of the Rehabilitation Act of 1973, prohibiting commercial airlines from discriminating against handicapped passengers.[3] *Paralyzed Veterans of America v. Civil Aeronautics Board*, 752 F.2d 694 (D.C. Cir. 1985), *rehearing and rehearing en banc denied* (April 26, 1985).

[2] Because of its interest in issues arising out of Section 504 and related statutes, EEAC filed briefs as amicus curiae in the Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (Section 504); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (Title IX); *University of Texas v. Camenisch*, 451 U.S. 390 (1981) (Section 504); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (Title IX); *Consolidated Rail Corporation v. Darrone*, 104 S.Ct. 1248 (1984) (Section 504); and *Grove City College v. Bell*, 104 S.Ct. 1211 (1984) (Title IX).

[3] Because the CAB has ceased to exist, the Department of Transportation now is the agency responsible for carrying out the CAB's functions under Section 504.

Published in June of 1982 after a lengthy rule-making procedure, the regulations in question were issued by the CAB to implement Section 504 with respect to the carriage of disabled passengers by commercial airlines. 47 Fed. Reg. 25,936, codified at 14 C.F.R. Part 382.[4] Because Section 504 prohibits handicap discrimination only in programs or activities receiving federal financial assistance, the CAB determined that its Section 504 regulations could be applied *only* to airlines receiving subsidies from the Board for flying the mails or servicing small communities. 47 C.F.R. at 25,937; 752 F.2d at 704-705. The CAB considered, but rejected, arguments that "all airlines receive direct and indirect Federal financial assistance in the form of air traffic control services, airport development grants, operating certificates giving exclusive domain over valuable air routes, and tax subsidies," and therefore that all airlines should be subject to the Section 504 regulations. *Id.* Because few major airlines received subsidies from the CAB, the CAB's jurisdictional determination left most major airlines unaffected by its Section 504 regulations. 752 F.2d at 705.

Paralyzed Veterans of America, American Coalition of Citizens with Disabilities, and American Council of the Blind (respondents here) petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the regulations. In their petition, the respondents advanced many of the same arguments that had been raised with the CAB in favor of broad coverage under Section 504. A

[4] The regulations were amended in November of 1982. 47 Fed. Reg. 51,857. The amendments are not relevant to this action.

panel of the Court of Appeals rejected the contention that exclusive operating certificates and favorable tax treatment constitute federal financial assistance under Section 504. 752 F.2d at 707-709. The panel agreed with the respondents, however, that federal assistance to airports constitutes federal financial assistance to airlines, because airports and airlines are "inextricably intertwined" in the provision of commercial air transportation, and therefore that airlines using federally funded airports are covered by Section 504 and should have been covered by the CAB's regulations. *Id.* at 712-715. The effect of the court's ruling was to extend the coverage of Section 504 to all commercial airlines. *Id.*

The panel also indicated its belief that the services of the national air traffic control system constitute federal financial assistance to the airlines. It relied in part on regulations listing "services of Federal personnel" among the forms of federal assistance that would trigger Section 504 coverage, and viewed the services of air traffic control personnel as such assistance. 752 F.2d at 710. The court observed that the air traffic control system is indispensable to modern aviation, and that if air traffic control were not provided by the federal government, the airlines would have to provide it themselves. *Id.* at 711. The court did not rest its decision on those grounds, however, because it was uncertain as to which "program or activity" received federal financial assistance in the form of the air traffic control system. *Id.* at 712. The panel did not resolve that question because of its holding based on federal aid to airports. *Id.*

The Court of Appeals, with three judges dissenting, denied DOT's petition for rehearing *en banc*. Writ-

ing for the dissenters, Judge Bork reasoned that the panel opinion could not be reconciled with this Court's decisions in *Grove City College v. Bell*, 104 S. Ct. 1211 (1984), and *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). In both cases, the Court construed the reach of Title IX of the Education Amendments of 1972[5] (which, like Section 504, was modeled on Title VI of the Civil Rights Act of 1964)[6] as being "program-specific." Observing that

> [the panel's] reading of section 504's statutory language would make every commercial enterprise a "recipient" of federal aid when it merely makes use of a service or facility that receives any federal assistance[,]

752 F.2d at 725, Judge Bork argued that applying Section 504 to airlines that receive no federal funds merely because they use federally assisted airports was an impermissible departure from *Grove City* and *North Haven*. *Id.*

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act is not applicable to commercial airlines merely because they use the facilities of federally assisted airports. The panel's holding that airlines that receive no federal funds, either directly or indirectly, are covered by Section 504 because airports receive federal aid is result-oriented jurisprudence that cannot be reconciled with the intent of Congress or previous decisions of this Court. The decision below, moreover,

[5] 20 U.S.C. § 1681 et seq.

[6] 42 U.S.C. § 2000d et seq.

is contrary to Congress' intent to limit the reach of Section 504 and kindred legislation to federally assisted programs and activities. It also ignores the fact that coverage of Section 504, Title VI and Title IX extends only to entities that *choose* to accept federal assistance. Under the reasoning of the lower court, however, coverage of Section 504 or other statutes easily could attach to entities other than airlines that neither receive federal funds nor have any voice in the decisions of other entities to request or accept such funds.

Nor does the federal air traffic control system constitute "federal financial assistance" to airlines under Section 504. The air traffic control system is a federally provided service that benefits airline passengers, shippers of goods by air, and people on the ground as well as airlines; all of those groups are beneficiaries of a federally operated program, not recipients of federal financial assistance. To hold otherwise would mean that virtually any entity that benefits from a federally conducted program could be subject to the provisions of Section 504, whether or not that entity receives federal funding, either directly or indirectly.

Should this Court affirm the decision below, EEAC respectfully suggests that the Court make clear that its decision is limited to the unique factual situation presented by this case—namely, the "indissoluble nexus" between airports and airlines. To avoid great uncertainty on the part of businesses as to whether Section 504 applies to them, and to spare the judicial system potentially limitless litigation probing the boundaries of Section 504, the Court should make clear that: (1) only the airlines' in-flight operations,

and not their other activities (such as hotels), are subject to Section 504 by reason of the federal "assistance" at issue here; and (2) other businesses are not subject to Section 504 coverage solely because they use the services of commercial airlines or use other federally-assisted facilities that are available to the public.

ARGUMENT

COMMERCIAL AIRLINES ARE NOT BROUGHT WITHIN THE PROVISIONS OF SECTION 504 OF THE REHABILITATION ACT OF 1973, EITHER BY THE EXTENSION OF FEDERAL FINANCIAL ASSISTANCE TO AIRPORTS OR BY PROVISION OF THE SERVICES OF FEDERAL AIR TRAFFIC CONTROLLERS.

I. FEDERAL FUNDING OF AIRPORTS DOES NOT CONSTITUTE FEDERAL FINANCIAL ASSISTANCE TO AIRLINES WITHIN THE MEANING OF SECTION 504.

Section 504 of the Rehabilitation Act of 1973 provides, in relevant part, that:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance*. . . .

29 U.S.C. § 794 (emphasis added). Congress thus limited Section 504's prohibition against handicap discrimination in two crucial respects. First, Section 504 applies only to the *program or activity* receiving federal financial assistance; it does not apply to an entire institution simply because one of the institution's activities receives federal funding. Second, Section 504 does not apply automatically to all entities

of a particular size, industry or segment of society. Section 504 applies only to entities that *choose* its coverage—that is, that elect to accept the benefits of federal assistance and its attendant burdens. The decision of the Court of Appeals cannot be reconciled with either aspect of the statutory scheme.

A. The Court of Appeals' Decision Is Contrary to the Program-Specific Nature of Section 504.

This Court has indicated unmistakably that the coverage of Section 504 is program-specific. In *Consolidated Rail Corporation v. Darrone*, 104 S.Ct. 1248 (1984), the Court stated that:

> Section 504, by its terms, prohibits discrimination only by a "program or activity receiving Federal financial assistance."
>
> * * * *
>
> Clearly, *this language limits the ban on discrimination to the specific program that receives federal funds.*

104 S.Ct. at 1255 (emphasis added).

Lower courts also have held repeatedly that Section 504 reaches only programs or activities receiving federal assistance, and does not cover an entire business or other organization simply because one of the organization's activities receives federal funds. *See, e.g., Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir. 1981) ("[T]he receipt of federal financial assistance by a multiprogram entity, for specific application to certain programs or activities, does not, without more, bring all of those multiple programs or activities within the reach of section 504."); *Simpson v. Reynolds Metal Company, Inc.*, 629 F.2d 1226, 1232 (7th Cir. 1980) ("[T]o be actionable [under

Section 504] the alleged discrimination must be in connection with a federally funded program or activity." [footnote omitted]); *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982); *Bachman v. American Society of Clinical Pathologists*, 577 F. Supp. 1257 (D.N.J. 1983); *Bento v. I.T.O. Corporation of Rhode Island*, 599 F. Supp. 731 (D.R.I. 1984); *Collins v. Chrysler Corporation*, 602 F. Supp. 1456 (E.D. Mo. 1985).

Moreover, in two other decisions construing the almost identical provisions of Title IX,[7] the Court held that the coverage of Title IX also is program-specific. In *Grove City College v. Bell*, 104 S. Ct. 1211 (1984), the Court held that Title IX applied to a private college that received no direct federal

[7] Section 901(a) of Title IX provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a). The language of Section 504 and Title IX is almost identical to the provisions of Section 601 of Title VI of the Civil Rights Act of 1964, which provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000(d). This Court has noted the similarity among the three statutes. See *Consolidated Rail Corporation v. Darrone*, 104 S. Ct. 1248, 1250 (1984); *Grove City College v. Bell*, 104 S. Ct. 1211, 1218 (1984). Accordingly, as the panel noted, authoritative interpretations of Title IX and Title VI can furnish useful guidance in the construction of Section 504. 752 F.2d at 706.

financial assistance, but at which some students received federal grants conditioned on their attendance at the college. 104 S. Ct. at 1220. However, the Court rejected the assertion that the college itself was a "program or activity," and therefore that all the affairs of the college could be regulated under Title IX. Instead, the Court found that only the college's student financial aid program could be characterized as receiving federal financial assistance, and therefore that only the financial aid program was subject to the requirements of Title IX. *Id.* at 1220-1222. Similarly, in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), the Court ruled that "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." [Citation omitted.] 456 U.S. at 538.

In this case, it appears to be undisputed that most airlines receive no federal subsidy, either directly or indirectly through intermediaries.[8] Clearly, then, the lower court should have found that, for most airlines, *no* "program or activity" receives federal financial assistance, and therefore that the CAB's regulations under Section 504 properly did not apply to most airlines.

The panel, however, attempted to circumvent the plain language and intent of Section 504 by characterizing the airlines as being involved with airports, which do receive federal grants,[9] in the "program or

[8] In this respect, airlines differ from Grove City College, which received no direct federal financing, but which received federal grant money indirectly through its students' tuition payments.

[9] *See* Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2201 *et seq.*

activity" of "providing commercial air transportation." 752 F.2d at 714. The court found an "indissoluble nexus" between airports and airlines in the "provision of commercial air transportation," and maintained that in that "program or activity" airports and airlines "are so functionally integrated that they become one." *Id.* The panel then apparently reasoned that, because airports receive federal financial assistance, and because airports and airlines together provide commercial air transportation, federal aid to airports is transformed into federal aid to airlines, or at least to the airlines' "program or activity" of providing commercial air transportation. *Id.* The Court therefore held that the CAB's regulations "must be applied to all air carriers using federally-funded airports in their 'program or activity' of providing commercial air transportation." *Id.*[10]

[10] The panel intimated, inaccurately, that the CAB originally interpreted its jurisdiction under Section 504 to include all airlines, and only later determined that it could regulate only federally subsidized carriers. 752 F.2d at 713. As the panel recognized, however, the Board in its notice of proposed rulemaking, 44 Fed. Reg. 32,401 (June 6, 1979), explained that it was not attempting to regulate the airlines' employment practices, in part because:

> The Board extends direct Federal subsidies only to a small number of air carriers, so that the reach of our section 504 jurisdiction would not have a significant effect on industry employment . . . . The Board would have no authority to regulate employment practices of unsubsidized carriers unless those practices somehow caused discrimination in transportation. [44 Fed. Reg. at 32,402.]

752 F.2d at 697. Clearly, then, the Board from the beginning interpreted its authority under Section 504 as limited to airlines receiving federal subsidies.

The mischief inherent in the lower court's result-oriented approach is apparent. Under that approach, a court could find any business covered by Section 504 simply by identifying *another* entity that receives federal financial assistance and that has a close relationship with the business, and by characterizing the functions performed jointly by the two entities as a "program or activity." By the court's reasoning, the business' "program or activity" would be construed as receiving federal financial assistance, even though neither the business nor the activity in question received federal funding either directly or indirectly. The effect of employing the court's analysis is, of course, to read Section 504's "program or activity" requirement—and, indeed, its federal funding requirement—out of the statute altogether.

In his dissent, Judge Bork identified the principal problem with the panel's decision:

> This reading of section 504's statutory language would make every commercial enterprise a "recipient" of federal aid when it merely makes use of a service or facility that receives any federal assistance. That idea has great potential. Trucking and bus companies use federally constructed and maintained highways, and their businesses are thus inextricably intertwined with a federally assisted program. Many electric companies rely on dams constructed and maintained with federal funds. Without the National Weather Service farmers would be unable to plan, protect, and cultivate their crops in an effective manner. It ought surely to be true that federal funding of federal courts results in the regulation of law firms since courts are inextricably intertwined with and indispensable to lawyering.

752 F.2d at 725. Judge Bork thus correctly demonstrated some of the absurd results that necessarily would flow from affirmance of the lower court's decision. Even Judge Bork's examples are underinclusive, however, because the list of potential "recipients" of federal assistance would not end with those entities that use federally assisted services or facilities *directly*.

Imaginative plaintiffs surely would burden the courts with claims that other entities whose activities are "inextricably intertwined," albeit indirectly, with federally supported programs are covered by these statutes. For example, the provision of commercial air transportation clearly requires more than just airports and airlines. It might be argued that the products of aircraft manufacturers and airplane fuel refiners are also "inextricably intertwined" with that "program or activity." If an "indissoluble nexus" is all that is required to invoke Section 504 coverage, then such manufacturers and refiners might also be found to be covered by the statute, even though they may have no relationship whatever with the airports and though they may receive no federal funding themselves. Then, too, if aircraft manufacturers are covered, what of suppliers of materials (for example, aluminum) "inextricably intertwined" with aircraft production? Would businesses whose employees fly on commercial airlines also be deemed providers of commercial air transportation because they pay for the airlines' services? If a business' employees make business trips in private airplanes to and from federally-funded airports, will its private flight activities be covered by Section 504? To pose these possible ramifications of the decision below is to expose the decision's lack of reality and flouting of the intent of Congress. EEAC, of course, strongly disagrees that any of these relationships could constitute "financial assistance" within the ambit of these federal funding statutes. We present these examples only to show the absurd implications of the panel's decision and the burdens which it could put on the federal court system.

If the program-specific coverage provision of Section 504 is given its plain meaning, see *Consolidated Rail Corporation v. Darrone, supra*, none of the activities of such businesses should be covered by the statute as a result of federal grants to airports. If the decision below is upheld, however, many businesses and other private organizations that accept no federal funding will be left in doubt whether Section 504 applies to them until the issue is tested in court. This Court should not countenance a ruling so at odds with Congress' clear statutory scheme as previously interpreted by the Court, particularly when that ruling renders the extent of Section 504's coverage almost totally unpredictable.

B. The Panel Decision Ignores the Volitional Aspects of Section 504.

Like Title VI and Title IX, Section 504 covers only entities that elect to receive federal financial support for their programs and activities. All three statutes thus allow employers and other organizations to decide whether to accept federal assistance and the legal obligations that accompany it, or to forego federal assistance and avoid coverage. In this volitional aspect, Section 504, Title VI and Title IX differ sharply from other civil rights statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* Both of the

latter statutes extend coverage to firms engaged in industries affecting commerce and employing at least 15 (under Title VII) or 20 (under the ADEA) workers. *See* 42 U.S.C. § 2000e(b), 29 U.S.C. § 630 (b). Such employers are covered automatically by Title VII and the ADEA; they may not avoid coverage by refusing federal benefits.

The significance of the volitional nature of coverage under Section 504, Title VI and Title IX has been recognized by the courts. In *Consolidated Rail Corporation v. Darrone, supra,* this Court observed, with respect to Section 504, that:

> . . . Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds. [Citation omitted.]

104 S. Ct. at 1254 n.13. Similarly, in *Grove City* the Court rejected the college's attempt to draw a parallel between federal grants to students and food stamps, Social Security benefits, welfare payments, and other forms of general assistance, in part because:

> [E]ducational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately receive federal funds made available to individuals under general assistance programs, *but they remain free to opt out of federal student assistance programs.*

104 S. Ct. at 1218 n.13 (emphasis added). The Court went on to say that:

> Congress is free to attach reasonable and unambiguous conditions to *federal financial assistance that educational institutions are not obligated to accept.* [Citation omitted.] *Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a).*

Id. at 1223 (emphasis added). Likewise, the Second Circuit has observed that:

> This emphasis upon the contractual nature of the receipt of federal moneys in exchange for a promise not to discriminate is still another reason to conclude that Title VI does not cover direct benefit programs since these programs do not entail any such contractual relationship.

Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1713 (1984).[11]

This Court has noted that, even where an entity unquestionably receives federal assistance, Congress' power to impose conditions on the recipient is based on the recipient's acceptance of the terms of the grant:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the

[11] The court in *Soberal-Perez* also quoted from the Congressional debates over Title VI, in which Senator Kuchel noted that:

> "No recipient is required to accept Federal aid. If a State or municipality or other local government agency does so, it does so voluntarily. It ought not to receive it if it is dedicated to use it in an unconstitutional manner." 110 Cong. Rec. 6562 (1964).

717 F.2d at 39.

> terms of the "contract." [Citations omitted.] There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [Footnote omitted.]

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981). The airlines thus may not be held subject to the requirements of Section 504 by reason of federal aid to airports, because there is no "contract" to which the airlines can assent at all, let alone voluntarily or knowingly.

In interpreting Section 504 as extending, in practice, to all commercial airlines, the Court of Appeals ignored the volitional aspect of Section 504 altogether. Normally, businesses can choose whether or not to accept federal subsidies for their activities and therefore can determine whether they wish to be covered by Section 504 in those activities. Airlines have no such choice, however, with respect to the "assistance" they receive from federal grants to airports. The only way a major airline could reject such "assistance" would be to refuse to use federally funded airports—that is, to go out of business as an air carrier. The decision below thus strips Section 504 of one of its vital provisions—the right of any entity to refuse federal funding and thereby avoid statutory coverage.

C. Airlines at Most Are Beneficiaries, Not Recipients, of Federal Assistance to Airports.

The Court of Appeals' ruling, in effect, that federal grants to airports constitute federal assistance to airlines ignores the distinction between recipients and beneficiaries of federal assistance under Section

504. The Justice Department's model regulations under Section 504 prohibit *recipients* of federal financial assistance from discriminating against the handicapped in federally assisted programs and activities. 28 C.F.R. § 41.51 *et seq.* Under those regulations, however:

> "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, *but excluding the ultimate beneficiary of the assistance.*

28 C.F.R. § 41.3(d) (emphasis added). *See also Bob Jones University v. Johnson*, 396 F.Supp. 597, 601 n.15 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (recipient under Title VI is the "intermediary entity whose nondiscriminatory participation in the federally assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve.")

Here, airport operators are "recipients" of federal grant assistance. The "beneficiaries" of federal grants to airports, however, are the people and entities that use airports—the flying public and the airlines. Because the airlines are beneficiaries, and not recipients, of federal assistance, it was error for the panel to hold that they should be covered under the CAB's Section 504 regulations.

Courts have recognized that not every kind of federal funding that inures to the benefit of an entity constitutes federal financial assistance to the entity under Section 504. Two courts, in fact, have held

that federal grants to airports and federal air traffic control services do not constitute "federal financial assistance" to airlines for the purposes of Section 504. *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984), *cert. dismissed*, 105 S. Ct. 2129 (1985);[12] *Angel v. Pan American World Airways, Inc.*, 519 F. Supp. 1173 (D.D.C. 1981).[13] Other courts also have found federal funding to one entity not to constitute "federal financial assistance" to a separate entity. *See Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881 (4th Cir. 1982) (baseball club, tenant of federally assisted stadium, not "recipient" of federal funding under Section 504); *Lemmo v. Willson*, 583 F. Supp. 557 (D. Colo. 1984) (joint apprenticeship, educational and training committee not recipient of federal financial assistance under Section 504 merely because apprentices worked for federal contractors). As the court aptly remarked in *Disabled in Action*,

> *Angel* suggests, however, that *one does not become subject to the Rehabilitation Act merely by enjoying indirectly the benefits of federal assistance to another.* We think that distinction is sound and fully applicable here.
>
> * * *
>
> At the very least, it is plain that the City is no mere conduit of federal assistance to the Club. Here, as in *Angel*, the benefits of federal assistance have accrued both to the direct recipient (the airport, the City) and to another entity (the airline, the Club) which shares in those benefits by virtue of business dealings with the direct recipient. *If the Rehabilitation Act extends to such indirect beneficiaries of federal largesse, consistency would demand that it apply to every customer of every enterprise subsidized by the federal government. Nothing in the language or legislative history of the Act indicates a congressional intention to reach so far.*

685 F.2d at 884-885 (emphasis added).

[12] The Ninth Circuit in *Jacobson* rested its holding on the ground that airlines pay for a larger share of the services of federally funded airports and air traffic control systems than the general public, and therefore that the provision of such services does not constitute "federal financial assistance" to the airlines. 742 F.2d at 1213. EEAC agrees with the Ninth Circuit's holding, but respectfully urges that an entity's status under Section 504 should not be determined by whether, or how much, the entity pays for the federal services from which it benefits.

[13] In its decision below, the panel declared *Angel* overruled. 742 F.2d at 714-715. EEAC respectfully suggests, however, that *Angel*, and not the lower court's decision, represents the proper view of the law and should be adopted by this Court.

D. Coverage of Airlines Solely by Reason of Federal Grants to Airports Is Not Justified by Congress' Concern for Employment and Transportation Opportunities for the Handicapped.

The Court of Appeals' reliance on Congress' concern that the handicapped have the fullest access to employment opportunities and means of travel, 752 F.2d at 715-716, is bootstrapping, pure and simple. Although Congress' interest in employment and travel opportunities for the handicapped cannot be gainsaid, the fact remains that Congress chose to prohibit discrimination against the handicapped *only* by employers and providers of transportation that accept federal financial assistance, and by the federal government. *See Consolidated Rail Corporation v. Darrone*, 104 S. Ct. at 1254 n.13. The court's attempt to expand the reach of Section 504 far beyond

the bounds legislated by Congress cannot be justified on the basis of Congress' concern for the rights of the handicapped to travel and find jobs. Had Congress wished to prohibit discrimination against the handicapped by all commercial airlines (rather than only those receiving federal subsidies), it had only to say so. Because Congress easily could have enacted legislation (but did not) specifically covering all airlines under Section 504, it is unlikely that Congress intended to provide for coverage of all airlines through the roundabout method purportedly discovered by the Court of Appeals.

II. THE SERVICES OF AIR TRAFFIC CONTROLLERS DO NOT CONSTITUTE FEDERAL FINANCIAL ASSISTANCE TO AIRLINES UNDER SECTION 504.

The Court of Appeals also stated that it considered the services of the federal air traffic control system to constitute "federal financial assistance" to airlines under Section 504.[15] 752 F.2d at 709-712. The court based its belief in part on federal regulations that define "federal financial assistance" to include "services of Federal personnel."[16] *Id.* at 710. The court viewed "services of Federal personnel" as including the services of the FAA's air traffic controllers, and therefore found that those services constituted federal funding to airlines. *Id.* The court also relied on the fact that air traffic control is essential to the airlines' operations, and that if the controllers' services were not provided by the federal government,

[15] As noted previously, the court did not base its holding on that belief.

[16] *See, e.g.*, 28 C.F.R. § 41.3(e) (Department of Justice regulations).

the airlines would have to provide those services themselves, at their own expense. *Id.* at 711.

In concluding (apparently) that any services of federal personnel that happen to benefit private entities constitute federal financial assistance to such entities, the panel again extended the reach of Section 504 far beyond that intended by Congress, and its decision could produce results completely at odds with congressional intent. If the decision below is affirmed, the courts can be expected to receive a whole spate of lawsuits testing the outer limits of the statute. Under a logical extension of the panel decision, for example, it might be argued that employers and unions that use the services of the Federal Mediation and Conciliation Service to assist in settling labor disputes are subject to Section 504 coverage. So also might it be argued that employers that request and receive opinion letters from the Equal Employment Opportunity Commission, indicating whether their employment practices comply with the civil rights laws, are covered by Section 504. Such examples could be multiplied, literally almost without number. There is no evidence that Congress intended to include within the sweep of Section 504 every activity of private citizens that receives some benefit from the services of federal agencies and departments.

The legislative history of Title VI contains a letter from the Deputy Attorney General to Congress that indicates that the benefits of federally conducted programs were not to be construed as federal financial assistance under Title VI. *See* 110 Cong. Rec. 13380-13382 (June 10, 1964). That letter contained a tentative list of federal assistance statutes that potentially would be covered by Title VI. Federally

conducted activities were expressly excluded from the definition of "federal financial assistance":

> Activities wholly carried out by the United States with Federal funds, such as river and harbor improvements and other public works, defense installations, veterans' hospitals, mail service, etc., are not included in the list. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal "assistance." While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of Title VI.

110 Cong. Rec. at 13380. That letter indicates, contrary to the lower court's conclusion, that Title VI (upon which Section 504 was modeled) does not cover private entities that simply benefit from the provision of a federal service such as the air traffic control system.

Moreover, as the CAB cogently argued, the services of the air traffic control system are "public goods," that is, goods and services that benefit all citizens and businesses, and that can be used by one person without diminishing anyone else's ability to enjoy them. 752 F.2d at 711.[17] Although airlines benefit from the services of air traffic controllers, so do airline passengers, owners and pilots of private aircraft, those who ship and receive goods on airplanes, and people on the ground who are protected from airplane crashes. Like airlines, those other individuals and entities benefit from the provision of federal air traf-

[17] Other common examples of public goods include national defense and clean air. *See, e.g.*, S. Fischer and R. Dornbusch, *Economics* (1983) at 420.

fic control services, but are not recipients of "federal financial assistance" under Section 504.[18]

The Court of Appeals attempted to deal with the CAB's argument by observing that:

> The fact is that the air traffic control system is *indispensable* to the *very existence* of modern commercial aviation, and that if it were not provided by the federal program now in place, it would have to be provided, and paid for, by the airlines themselves.

752 F.2d at 711 (emphasis in the original; footnote omitted). The panel's observation is a variant of the argument that federal assistance to one program conducted by an entity "frees up" resources of the entity for use in non-federally funded activities, and consequently that all the entity's programs should be covered by Section 504 because all benefit indirectly from the federal funds. That argument, however, was considered and squarely rejected in *Grove City*, in which the Court ruled that:

> [T]he Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute.

104 S. Ct. at 1221. The Court's rejection of the "freeing up" argument as applied to institutions that actually receive federal funding ought to apply with

[18] In support of its position, the CAB pointed out that the FAA also does not consider its air traffic control system to constitute federal financial assistance to airlines. 47 Fed. Reg. at 25,937.

even greater force to entities that receive no federal funds, but simply benefit from a federally provided service.[19]

III. IF THE DECISION OF THE COURT OF APPEALS IS AFFIRMED, THE COURT SHOULD MAKE CLEAR THAT THE COVERAGE OF SECTION 504 UNDER THAT DECISION IS LIMITED TO THE IN-FLIGHT OPERATIONS OF THE AIRLINES THEMSELVES, AND DOES NOT EXTEND EITHER TO THE AIRLINES' OTHER OPERATIONS OR TO THE OPERATIONS OF OTHER ENTITIES THAT USE THE SERVICES OF THE AIRLINES.

As discussed above, the EEAC believes that the lower court's decision extending Section 504 coverage, in effect, to all commercial airlines was erroneous and should be reversed. If, however, this Court

[19] The Court of Appeals also rejected the CAB's "public good" argument because, in the court's view,

> it would be absurd to exempt a federally-funded local transit authority or school system from compliance with section 504 on the ground that public transportation benefits passengers as well as transit systems and, like public education and safe air travel, it is a "public good."

752 F.2d at 711 (footnote omitted). It is obviously inappropriate, however, to compare local transportation systems and public schools, which concededly receive federal funding, with airlines that receive *no* federal funding, but simply benefit along with many other individuals and entities from a federally provided service. A closer analogy to the public education system would be to argue that entities that benefit from a more skilled workforce trained in a public school system that receives federal education assistance would thereby become funds "recipients" themselves. But that result obviously would be even more questionable than covering airlines under Section 504. Once more, the logic of the lower court's ruling cannot withstand scrutiny.

should affirm the decision below, EEAC respectfully suggests that the Court make clear that its ruling is limited to the unique aspects of this case—that is, to the "indissoluble nexus" between airports and airlines. Specifically, EEAC respectfully urges that the holding below, if affirmed, be limited to the in-flight operations of the airlines themselves. That is, Section 504 coverage should not be extended to other operations of the airlines (such as hotels), merely by reason of federal grants to airports or the federal air traffic control system. Such a limitation would be consistent with the Court's decisions in *Grove City*, *North Haven*, and *Darrone*, and would be in accord with the program-specific provisions of Section 504.

EEAC further respectfully suggests that the Court make clear that the federal grants and services at issue here do not constitute "federal financial assistance" to the operations of suppliers of aircraft, fuel, and other products and services to the airlines, or of businesses and other entities that use the services of commercial airlines. Even if federal aid to airports or the services of federal air traffic controllers are found to constitute federal assistance to airlines, the relationship between those federal funds and services and businesses and entities other than airlines plainly is too tenuous to cause the latter to be covered by Section 504. Businesses and other entities should be able to predict with reasonable confidence whether Section 504 applies to them at all. Affirmance of the decision below without the limitations suggested above would cause significant uncertainty and confusion and encourage unwarranted, frivolous litigation.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed. In the alternative, EEAC respectfully suggests that the Court limit the effect of that decision as discussed in Section III.

Respectfully submitted,

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December 19, 1985

AMICUS CURIAE

BRIEF

(9)

No. 85-289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et. al.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et. al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE NATIONAL FEDERATION OF THE BLIND AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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IN THE

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UNITED STATES DEPARTMENT OF TRANSPORTATION, *et. al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE NATIONAL FEDERATION OF THE BLIND AS AMICUS CURIAE SUPPORTING AFFIRMANCE

This brief amicus curiae of the National Federation of the Blind is submitted with the consent of the petitioners, respondents and intervenor, pursuant to Supreme Court Rule 36.2.

STATEMENT OF INTEREST

The National Federation of the Blind (hereafter, the "NFB") is the most active nationwide membership organ-

ization of blind people in the United States, with chapters in every state and the District of Columbia. The issues presented in this case are of broad and compelling interest to all members of the NFB. In fact, the NFB filed the initial petition for rulemaking with the Civil Aeronautics Board (hereafter, the "CAB"), which resulted in the case now before this Court. *Paralyzed Veterans of America v. Civil Aeronautics Board,* 752 F.2d 694, 697 (D.C. Cir. 1985),[1] *rehearing and rehearing en banc denied* (April 26, 1985), *cert. granted sub nom. Department of Transportation v. Paralyzed Veterans of America,* ____ U.S. ____, 106 S. Ct. 244 (October 21, 1985).

STATEMENT OF THE CASE

The CAB developed and issued regulations under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982), prohibiting airlines from discriminating against handicapped passengers. 752 F.2d 698. Those regulations were published in 14 C.F.R. Pt. 382 (1982).

As originally promulgated, those regulations were tripartite. 752 F.2d 698. "Subpart A — 'General Provisions' — prohibited 'discrimination in air transportation against qualified handicapped persons.' " 752 F.2d 698. By its terms, Subpart A applied to all certificated air carriers, regardless of whether they received federal financial assistance in any form. 14 C.F.R. §382.2(a) (1982).

Subpart B — "Specific Requirements" — and Subpart C — "Compliance" — were, as originally promulgated, limited by their terms to air carriers that received a subsidy directly or through another recipient from the CAB. 14 C.F.R. §382.10(a) & §382.20(a) (1982).

Respondents, the Paralyzed Veterans of America and

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[1] All references in this brief to the decision of the Court of Appeals below will be followed by a citation to the official report of same in 752 F.2d.

two other organizations representing disabled individuals, brought this action, seeking review of 14 C.F.R. Pt. 382. *Brief For The Petitioners* at pp. 2-3.

The Court of Appeals below held that the commercial aviation activites of all certificated airlines constitute federally assisted programs or activities, because the airlines have the use of federally assisted airports. *Brief For The Petitioners* at p. 3. In addition, the Court of Appeals was of the view that the federally operated air traffic control system constitutes federal financial assistance to the commercial aviation activities of all airlines. *Brief For The Petitioners* at p. 3.

As a consequence of the foregoing, the Court of Appeals vacated the CAB's restrictive reading of its rulemaking authority and ordered that all of the rules contained in 14 C.F.R. Pt. 382 (Subpart A, Subpart B and Subpart C) apply with equal force to all certificated air carriers operating in the United States. 752 F.2d 724-725.

The Court of Appeals then remanded this action to the Department of Transportation (hereafter, the "DOT")[2] so that agency would have

> . . . an opportunity, . . . to fashion a Nondiscrimination Rule that is consistent with its current regulation of airports, its own understanding of the CAB's regulatory authority over air carriers as expressed throughout these proceedings, and the intent of Congress.

Id.

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[2] As noted in the *Brief For The Petitioners* at p. 3, n.1: "The CAB ceased operations on December 31, 1984. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*; Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* Section 3(e) of the Sunset Act (98 Stat. 1704) devolved all remaining authority of the CAB on the Department of Transportation, unless otherwise provided. Section 12(a) of the Sunset Act (98 Stat. 1710) preserved all CAB rules and regulations in effect at the time of transfer."

The petitioners sought a Writ of Certiorari from this Court on only two questions:

> 1. Whether federal financial assistance to airport operators renders Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, applicable to the on-board activities of airlines using federally-assisted airports.
>
> 2. Whether the federally-operated air traffic control system constitutes a form of federal financial assistance to airlines.

The petitioners have not taken issue with the testimony received by the CAB[3] prior to the formulation of the rules in 14 C.F.R. Pt. 382. The NFB respectfully suggests to this Court that the acts of discrimination perpetrated against the handicapped by commercial airlines[4] are very real and should not be dismissed lightly by this Court when considering the position taken by the petitioners, and those supporting the petitioners, in this case.

In addition to the NFB and the respondents, numerous other organizations representing handicapped persons commented on the regulations proposed by the CAB in 14 C.F.R. Pt. 382. 752 F.2d 701. These organizations included the National Association of the Deaf, the National Capital Chapter of the National Multiple Sclerosis Society, the Disability Rights Center, the National Center for Law and the Deaf, and the National Association for Retarded Citizens. *Id.*, at n. 46.

The discrimination suffered by handicapped citizens on-board the commercial airlines of this country was well documented in testimony before the CAB, and was recognized repeatedly by the Court of Appeals in reaching its decision below.

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[3] The referenced testimony is cited throughout the text and footnotes of the Court of Appeals decision below. 752 F.2d *passim*.

[4] *Id.*

'The question of whether a blind person may have his cane during flight,' according to a 'Fact Sheet' submitted to the [CAB] by the National Federation of the Blind, 'is no exception to th[e] chaotic configuration of procedures and practices by the airlines.' Noting that many airlines treated canes as any other carry-on baggage to be stowed at the discretion of the carrier, the Federation noted that '[t]he white cane is of functional necessity to its owners just as the guidedog is inextricably bound to its master,' placing it 'entirely out of the category of portable hardware when it comes to the importance that the white cane holds for blind persons. The white cane represents one of two full-proof [sic.] methods of independent travel for the blind, and is therefore symbolic of the mobility and self-sufficiency which blind people strive for. Stowing a blind person's cane in some far-off closet is not like doing so to another person's extra clothes bag.'

752 F.2d 702, at n. 61.

The Court of Appeals pointedly made reference in its decision to many other instances of discrimination against the handicapped on-board commercial airlines. For example, citing comments made to the CAB by the NFB, the Court of Appeals observed that blind couples have been asked to sit on blankets, "... apparently due to [the] assumption that all handicapped people are incontinent . . ." 752 F.2d 720, at n. 186.

Based on the record established during the CAB rulemaking process, which culminated in the issuance of the rules in 14 C.F.R. Pt. 382, the Court of Appeals below concluded:

> Unwarranted assumptions and stereotypes have clearly caused airline personnel to discriminate against disabled passengers.

752 F.2d 720.

This Court should consider several other points made by the Court of Appeals, in reviewing the record which was before the CAB prior to the issuance of the rules in 14 C.F.R. Pt. 382. First, as noted by the United Cerebral Palsy Association:

> '[T]he American people are dependent on air travel for vital opportunities [since] many people must travel by air in order to perform their jobs. Clearly, access to air travel is not a luxury[;] it is vital to anyone wishing to participate in the mainstream of society.'

752 F.2d 716, at n. 153.

The Court of Appeals below also took special note of the comments made to the CAB by the Architectural and Transportation Barriers Compliance Board [hereafter, the "ATBCB"], prior to the issuance of the rules in 14 C.F.R. Pt. 382: "'. . .Without the right of access to transportation, all other civil rights are meaningless.'" 752 F.2d 716. The ATBCB supported the Respondents' position on the meaning of federal financial assistance, and further declared to the CAB prior to the issuance of the rules in 14 C.F.R. Pt. 382:

> 'A disabled person's theoretical right to air travel is meaningless if he or she cannot board the plane, go from the entry to his or her seat conveniently and with dignity, travel about the cabin, and use the lavatory....'

752 F.2d 716, at n. 154.

SUMMARY OF ARGUMENT

The petitioners have conceded that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, applies to commercial airlines. In emphasizing the sunsetting of Section 404(b) of the Federal Aviation Act, 49 U.S.C. app. §1374(b) (1982), the petitioners ignore completely and refuse to deal with the language of Section 404(a) of said Act and the CAB's construction of same.

Neither the DOT nor the CAB have ever considered the

jurisdictional impact of relying on both Section 404(a) of the Federal Aviation Act and Section 504 of the Rehabilitation Act of 1973, as the basis for applying the regulations in 14 C.F.R. Pt. 382 to all certificated carriers. The petitioners dismiss Section 404(a) as unimportant to the resolution of this case because they fear its impact.

Section 504 is a remedial statute and it should be accorded a broad construction in order to effectuate its purpose. Even the ATBCB, the only federal agency created by the Rehabilitation Act of 1973, interpreted Section 504 as definitely applying to all certificated air carriers, commercial and otherwise. The ambivalence of other federal agencies, including the petitioners, concerning the application of Section 504 to commercial air carriers, presents this Court with a problem of statutory construction.

This Court has emphatically declined to bestow on any federal agency the power to re-interpret an act of Congress whenever it elects to do so. The NFB asks this Court to address Section 504 in the same spirit it has addressed similar statutes, by looking to the object and policy of Section 504.

The intent of Congress, public policy and the previous decisions of this Court make it clear that the ATBCB correctly interpreted Section 504 as prohibiting discrimination against handicapped citizens on-board all certificated carriers, commercial and otherwise.

There are only two narrow questions now before this Court. In resolving these questions, consistent with Section 404(a), Section 504 and 14 C.F.R. §382.4, the NFB urges this Court to condemn discrimination against citizens, because of their handicap, under all circumstances.

ARGUMENT

I. SECTION 504 APPLIES TO ALL CERTIFICATED AIR CARRIERS, COMMERCIAL OR OTHERWISE.

The NFB urges this Court to review carefully the concessions made by the petitioners in their brief, concerning the applicability of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, to commercial airlines. For example, the NFB calls attention to the following quote from the petitioners' brief.

> It is true that both DOT and the Board [CAB] initially expected the Board to promulgate regulations prohibiting all certificated carriers from discriminating against handicapped air travellers; this was to be accomplished, however, through renewed reliance on Section 404(b), *and not Section 504 alone*. But the congressionally mandated 'sunset' of Section 404(b) made it impossible for the Board to carry out its original intent to write regulations that would cover both subsidized and nonsubsidized carriers . . . [emphasis supplied].

Brief For The Petitioners at pp. 32-33.

The petitioners do not deny that Section 504 applies to all certificated air carriers. The petitioners appear to argue that the sunsetting of Section 404(b) of the Federal Aviation Act, 49 U.S.C. app. §1374(b) (1982), has so weakened Section 504 that it no longer provides a basis for the regulations in 14 C.F.R. Pt. 382.

However, the petitioners acknowledge that the CAB, after consultation with the Department of Justice, concluded that the "safe and adequate service" clause of Section 404(a) of the Federal Aviation Act, 49 U.S.C. app. §1374(a) (1982), which is still in full force and effect,

> . . . might support a general prohibition against dis-

crimination on the basis of handicap applicable to all carriers, but that it was too slender a reed to justify the imposition of more specific regulations applicable to the on-board activities of nonsubsidized carriers.

Brief For The Petitioners at p. 12.

The petitioners refuse to deal with the language of Section 404(a) and the CAB's construction of same as providing a basis for a general ban on handicap discrimination on-board all certificated carriers, arguing that these ". . .are interesting legal questions, but they are not before this Court." *Brief For The Petitioners* at pp. 12-13, n. 11. The petitioners then state that:

> Neither DOT nor the Board [CAB] ever expressed the view that Section 504 alone provided the Board [CAB] with such sweeping authority, and the [C]ourt of [A]ppeals should have respected the agencies' determination of their own jurisdiction [footnote omitted].

Brief For The Petitioners at p. 33.

Neither the DOT nor the CAB have ever considered the jurisdictional impact of relying on both Section 404(a) and Section 504 as the basis for applying the regulations in 14 C.F.R. Pt. 382 to all certificated carriers. The petitioners dismiss Section 404(a) as unimportant to the resolution of this case because they fear its impact.

Before the commencement of this action, the CAB concluded that the "safe and adequate service" clause of Section 404(a) "might support" a general prohibition against discrimination on the basis of handicap applicable to all air carriers, after consulting with the Attorney General of the United States who, pursuant to Executive Order No. 12,250 [3 C.F.R. 298 (1981)], was directed to coordinate the implementation and enforcement by executive agencies of the nondiscrimination provisions contained in a number of civil rights statutes, including Section 504. *Brief For The Petitioners* at p. 12, n. 10.

In fact, the final regulations promulgated by the CAB, after consultation with the Justice Department, and before this action was commenced, contained a general prohibition against handicap discrimination on-board all air carriers (commercial and otherwise). 14 C.F.R. §382.4 (1982). The provisions of Subpart A provide, in part:

> **§382.1 *Purpose.***
>
> *The purpose of this part is to ensure that handicapped persons receive adequate air transportation service, without unjust discrimination based on handicap,* and to implement section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance . . . .
>
> **§382.4. *Prohibition against discrimination.***
>
> Carriers subject to this part shall not discriminate against any qualified handicapped person because of that person's handicap [emphasis supplied].

The petitioners acknowledge that by virtue of the "safe and adequate service" provision of Section 404(a) of the Federal Aviation Act, ". . . Subpart A regulations [which contain §382.4] apply to all certificated carriers, whether they receive federal financial assistance or not." *Brief For The Petitioners* at p. 13. The petitioners refuse to deal with Section 404(a) because they cannot logically explain that Section away, consistent with the arguments they are now advancing concerning Subparts B and C of the regulations at 14 C.F.R. Pt. 382.

Although the petitioners would suggest that an artificial jurisdictional distinction exists between Subpart A and Subparts B and C of 14 C.F.R. Pt. 382, there is no authority for that proposition. In fact, the CAB urged ". . . nonsubsidized [i.e., commercial] carriers to look to Subpart B" of the regulations at 14 C.F.R. Pt. 382 for guidance in complying with the general antidiscrimination provisions of Subpart A. *Brief For The Petitioners* at p. 14, n. 13.

The NFB deplores the specific acts of discrimination perpetrated against the handicapped on-board the commercial airlines of this country. The handicapped of this country deserve the benefit of specific regulations to combat specific acts of discrimination against them.

II. BY ENACTING SECTION 504, CONGRESS INTENDED TO INSURE THAT HANDICAPPED CITIZENS HAVE EQUAL ACCESS TO ALL ASPECTS OF OUR SOCIETY.

As noted by the Court of Appeals below, Section 504 is a remedial statute and it should be accorded a broad construction in order to effectuate its purpose. 752 F.2d 710. *See also Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1380 (5th Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *accord, Peyton v. Rowe*, 391 U.S. 54, 65 (1968).[5] The petitioners dismiss the will of Congress as irrelevant to the interpretation of Section 504:

> But statements of congressional concern about an issue—even if they appeared in the Rehabilitation Act itself—would not support the extension of Section 504 to anything other than federally assisted programs.

Brief For The Petitioners at p. 34.

The petitioners admit that handicapped citizens have civil rights when they enter an airport. Congress made it clear that the civil rights of the handicapped do not end when they enter an airplane, and the "federal financial assistance" clause of Section 504 must be interpreted so that it is consistent with this intention. S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, 2122. Because no distinction can be made between the civil rights of the handicapped in an airport or on an airplane, the Court of Appeals below correctly interpreted the will of Congress: Under the "federal financial assistance" clause of Section 504: "Airports and airlines are inextricably intertwined." 752 F.2d 714.

[5] This Court has not hesitated to give the broadest possible reading to remedial statutes similar to Section 504. *Grove City College v. Bell*, 465 U.S. 555, 564-566 (1984). However, while some useful analogies can be drawn to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.* (1982), and to Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.* (1982), the petitioners have failed entirely to recognize the unique and individual character of Section 504. This Court has recognized that Section 504 is unique and does not depend upon Title VI, or any other federal law. *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 631-634 (1984).

A. The will of Congress expressed in its Legislative History, is clear: Discrimination against citizens because of their handicap is unlawful.

Congress made the following finding when enacting amendments to the Rehabilitation Act of 1973:

> Individuals with handicaps are all too often excluded from schools and educational programs, barred from employment or are under-employed because of archaic attitudes and laws, denied access to transportation, buildings, and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms.
>
> Not the least of the problems is the fact that the American people are simply unfamiliar with and insensitive to difficulties confront[ing] individuals with handicaps. The failure to involve individuals with handicaps in the development of programs which affect their lives certainly fosters this problem. The public lacks adequate knowledge about the potential of these individuals to contribute significantly to society. Too often we automatically make the assumption that nothing can be done. With that assumption made, even the best programming and the most advanced services cannot meet their goals. It is against the basic tenets of the scientific process to make an assumption of no hope and

no help. *No less should be true of public policy.* In the case of individuals with handicaps, making this assumption all too often has resulted in the violation of their basic rights as human beings, and has condemned them to live useless lives. Foresight and a strong commitment to the worth and dignity of the human life could have allowed them to live their lives with respect and dignity as first class citizens.

> . . . It is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps [emphasis supplied].

S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6400-01, 6421.

This Court has established very specific guidelines for the interpretation of Congressional enactments. In *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 468 U.S. _____, 104 S. Ct. 2979, 2983 (1984) this Court observed:

> We previously have stated that post hoc rationalizations by counsel for agency action are entitled to little deference: 'It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.'

The petitioners agree that the intent of Congress is clear: Discrimination against citizens because of their handicap is unlawful. *Brief For The Petitioners* at pp. 33-35.

Understandably, the petitioners have a great deal of difficulty explaining the position taken by the ATBCB. The ATBCB was established by the same act of Congress which created Section 504. 29 U.S.C. §792 (1982). The ATBCB is composed of the heads of various agencies, including the DOT and the Department of Justice, and other members

appointed by the President of the United States. Congress has declared:

> . . . It shall be the function of the [ATBCB] to: . . . (2) investigate and examine alternative approaches to the architectural, transportation, communication, and attitudinal barriers confronting handicapped individuals, *particularly with respect to* telecommunication devices, public buildings and monuments, parks and parklands, *public transportation (including air,* water, and surface transportation whether interstate, foreign, intrastate, or local), and residential and institutional housing; . . . [emphasis supplied].

29 U.S.C. §792 (b) (2).

Therefore, the interpretation of Section 504 by the ATBCB takes on added significance. As the Court of Appeals below noted:

> Congress was well aware in passing the 1973 Act, so much of which was aimed at vocational rehabilitation, that 'even [if] the maximum employment opportunities for the handicapped [were] fully created, they could not be filled without the ability of handicapped individuals to get to their jobs.' . . . So even if transportation *per se* had not been singled out by Congress in section 502 of the 1973 Act, and even if the Act's administrative creation, the ATBCB, had not testified in favor of giving the broadest possible reading to section 504 in the proceedings below [before the CAB], any fair reading of the Act reveals that maximizing employment opportunities — and therefore minimizing barriers to transportation — for the disabled goes to its very heart [citations omitted].

752 F.2d 716.

B. Canons of statutory construction reinforce the conclusion that Congress intended to eliminate handicap discrimination to the maximum extent possible.

The ATBCB, the only federal agency created by the Rehabilitation Act of 1973, interpreted Section 504 as definitely applying to all certificated air carriers, commercial and otherwise. 752 F.2d 716-717. Other federal agencies, including the petitioners, have expressed ambivalence about the extent to which Section 504 applies to all certificated carriers. These differing interpretations of Section 504 by federal agencies present this Court with a problem of statutory construction.

In resolving this problem, the interpretation of Section 504 by the ATBCB is entitled to great deference, in view of the stated Congressional purpose in creating the ATBCB. According to the Committee on Labor and Public Welfare:

> ***Architectural and Transportation Barriers Compliance Board***
>
> The Committee is aware through testimony on this legislation, not only of strong attitudinal barriers, but also enormous physical barriers to the mobility of the handicapped individual. The Committee strongly believes that a new Federal board is necessary to insure compliance with the present Federal statutes regarding architectural barriers since compliance has been very spotty and there is no such comparable compliance unit in existence at this time. *Such a unit* [i.e., the ATBCB] *will enhance the effectiveness of the other provisions of the bill since even were the maximum employment opportunities for the handicapped fully created, they could not be filled without the ability of handicapped individuals to get [to] their jobs.* Barrier-free design in Federal buildings and in Federally-assisted projects is mandated in present law, but has never been adequately enforced. The Committee feels that to justify the expenditures authorized under this bill it is imperative that handicapped individuals be given the opportunity to move freely in the society into which they must integrate themselves. The Committee believes this Board [ATBCB] can serve to accomplish this [emphasis supplied].

S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2122.

More importantly, as recently as October 1984, Congress reaffirmed the ATBCB's interpretation of Section 504 in unmistakeable language.

> ***Access For Handicapped Persons***
>
> *Sec. 14.* Section 104 is amended by adding at the end thereof the following new sentence: 'In the furtherance of such right, the Board or the Secretary, as the case may be, shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973, prior to issuing or amending any order, rule, regulation, or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped persons.'

Section 14 of the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1711, 98th Cong., 2d Sess. (Oct. 4, 1984).

The Court of Appeals duly noted this recent legislation at 752 F.2d, pp. 718-719.

This Court has previously addressed a constructional problem with respect to Section 504 of the Rehabilitation Act of 1973. In *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979), this Court stated:

> Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor

the clear meaning of a statute, as revealed by its language, purpose, and history.'

This Court has emphatically declined to bestow on any federal agency the power to re-interpret an Act of Congress whenever it elects to do so. In *FEC v. Democratic Senatorial Campaign Committee,* 457 U.S. 27, 31-32 (1981), this Court declared:

> Although the Court of Appeals first addressed whether and to what extent it should defer to the Commission's construction of the Act, . . . this discussion and the conclusion that little or no deference was due the Commission were pointless if the court was correct that the agency agreements violated the plain language of the Act as well as the statutory purposes revealed by the legislative history. The interpretation put on the statute by the agency charged with administering it is entitled to deference, . . . but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement [citations omitted].

The Court of Appeals applied this Court's reasoning in the *FEC* case to the rulemaking of the CAB, holding as follows:

> We find additional support for our holding today in what might best be termed the need for regulatory consistency and rationality. The CAB's discussion of its section 504 authority, and particularly of its rather sudden reversal of position between 1979 and 1982, was inadequate, vague and contradictory. Not only was its reliance on *Angel* (and that case's misreading of *Gottfried*) misplaced, but even on its own terms the Board's analysis was turgid. Claiming to reject the 'restrictive reading of our jurisdiction put forth by the airlines,' the Board insisted that it was 'adopting an approach . . . that represents a compromise between applying the rule to all carriers and having no rule at all.' The form this 'compromise' took, of course, was to apply only the general antidiscrimination provisions (Subpart A) to all airlines, while applying the specific, substantive provisions (Subparts B and C) to subsidized carriers only, claiming without any citation to authority that '[t]hose carriers subject only to the general provisions of Subpart A should look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate.'
>
> Respondents [petitioners in this Court] are unclear, as the Board was, about the source of the CAB's conclusion that non-subsidized carriers 'should look to' Subpart B. They point to the duty of every air carrier to provide 'adequate service' under section 404(a) of the Federal Aviation Act as supplying the 'requisite authority to apply general provisions' to non-subsidized carriers. *But they do not — and, we believe, cannot — explain why section 404 (a), if it authorizes the application of Subpart A, will not extend to Subparts B and C, which give the general provisions substance and teeth.* They do not — and, we believe, cannot — explain what 'look to' means, or why it is that, as respondents [in this Court the "petitioners"] contend in their brief, 'non-subsidized certificated carriers could not ignore the specific requirements applicable to the subsidized carriers.' In fact, they could do precisely that if the CAB's view of the scope of section 504 in this case were affirmed by this court [emphasis supplied]; [citations omitted].

752 F.2d 717.

This Court has also stated in *Watt v. Alaska,* 451 U.S. 259, 265-266, (1981):

> We agree with the Secretary that '[t]he starting point in every case involving construction of a statute is the language itself.' . . . But ascertainment of the mean-

ing apparent on the face of a single statute need not end the inquiry [citations omitted].

The NFB asks this Court to address Section 504 in the same spirit it addressed the statute under consideration in *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975):

> 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, *and to its object and policy.*'. . . Our objective in a case such as this is to *ascertain the congressional intent* and give effect to the legislative will [emphasis supplied]; [citations omitted].

Finally, as this Court so aptly noted in *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 737 (1975):

> It is therefore proper that we consider, in addition to the factors already discussed, what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance.

The intent of Congress, public policy and the previous decisions of this Court make it clear that the ATBCB correctly interpreted Section 504 as prohibiting discrimination against handicapped citizens on-board all certificated carriers, commercial and otherwise.

III. ONLY THE QUESTIONS SET FORTH IN THE PETITION OR FAIRLY INCLUDED THEREIN SHOULD BE CONSIDERED BY THIS COURT [SUPREME COURT RULE 21.1 (a)].

The Petition for a Writ of Certiorari to this Court presents two narrow questions:

> 1. Whether federal financial assistance to airport operators renders Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, applicable to the on-board activities of airlines using federally-assisted airports.
>
> 2. Whether the federally-operated air traffic control system constitutes a form of federal financial assistance to airlines.

In resolving these questions, consistent with Section 404 (a), Section 504 and 14 C.F.R. §382.4, the NFB urges this Court to condemn discrimination against citizens, because of their handicap, under all circumstances.

CONCLUSION

As the ATBCB said in its testimony before the CAB: " '. . . Without the right of access to transportation, all other civil rights are meaningless.' " 752 F.2d 716. The NFB urges this Court to affirm in all respects the decision of the Court of Appeals below, and to affirm in the strongest possible terms that discrimination against the handicapped on-board commercial air carriers is unlawful.

Respectfully submitted,

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